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No. _____

In the Supreme Court of the United States

ANDREA SKOROS, individually, and next friend of NICHOLAS TINE, a minor, and CHRISTOS TINE, a minor,

Petitioners,

v.

CITY OF NEW YORK, JOEL L. KLEIN, in his official capacity as Chancellor, New York City Department of Education, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents an issue of exceptional public importance. It involves an Establishment Clause challenge to a religiously divisive policy promulgated by the Department of Education for the City of New York—the largest public school system in the country—that affects over one million students enrolled in 1,200 public elementary and secondary schools. The public school policy at issue expressly permits Jewish and Islamic religious symbols in year-end holiday celebrations, but bans the similar use of Christian religious symbols.

In a lengthy decision, a sharply divided panel of the Second Circuit held that this policy does not violate the Constitution. Because this decision conflicts with decisions from this and other federal courts, review is necessary to secure and maintain uniformity of this Court's decisions. Moreover, review is necessary to provide much needed guidance to the lower courts that is capable of consistent application in cases arising under the Establishment Clause.

1. Whether the Establishment Clause prohibits a public school policy directed at schoolchildren participating in year-end holiday celebrations that expressly utilizes Jewish and Islamic religious symbols, but bans the similar use of Christian religious symbols, thereby making denominational preferences and showing hostility toward the Christian religion.

2. Whether the reasonable observer standard of the endorsement test was changed in *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005), such that young schoolchildren can no longer satisfy the requirements of an "objective observer," as the Second Circuit held in this case.

3. Whether this Court should abandon the endorsement test because it is unworkable and incapable of consistent application, as this case demonstrates.

PARTIES TO THE PROCEEDING

The Petitioners are Andrea Skoros, individually and as next friend of her minor children, Nicholas Tine and Christos Tine ("Petitioners").

The Respondents are the City of New York, Joel L. Kline, in his official capacity as Chancellor, New York City Department of Education, and Sonya Lupion, individually and in her official capacity as Principal, Edith K. Bergtraum School, New York City Department of Education ("Respondents").

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OPINIONS BELOW

The opinion of the two-judge majority, App. 3a, appears at 437 F.3d 1. The dissenting opinion, App. 83a, appears at 437 F.3d at 42. The unpublished district judge's opinion appears at App. 124a.

JURISDICTION

The opinion of the panel was issued on February 2, 2006. A petition for panel rehearing and a petition for rehearing en banc were denied on May 25, 2006. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

STATEMENT OF THE CASE

On February 25, 2003, Petitioners filed a First Amended Complaint for declaratory and injunctive relief and nominal damages pursuant to 42 U.S.C. § 1983, challenging the constitutionality of the religious display policy of the New York City Department of Education.[1] Pursuant to this policy, Respondents permit and encourage the public display of the

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[1] The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1343(a)(3).

menorah, a Jewish religious symbol, and the star and crescent, a religious symbol of the Islamic faith, during various religious holidays and year-end seasonal observances. However, this policy prohibits the similar display of the Christian crèche or nativity at any time, including a simple picture of the nativity displayed during the Christmas season. *See, e.g.*, App. 157a (picture of the nativity). As described by the Second Circuit majority, the Respondents' "policy allows the menorah to be displayed as a symbol of the Jewish holiday of Chanukah and the star and crescent to be displayed as a symbol of the Islamic holiday of Ramadan, but it does not allow a crèche or nativity scene to be displayed as a symbol of the Christian holiday of Christmas." App. 4a. This policy applies in all of the primary and secondary public schools in the City of New York, which has the Nation's largest public school system.

Petitioners challenged the constitutionality of Respondents' policy under the First and Fourteenth Amendments to the United States Constitution, claiming, *inter alia*, that this policy and its application violate the Establishment Clause.

The parties initially cross-moved for summary judgment, and Petitioners moved in the alternative for a preliminary injunction. On December 4, 2003, the parties subsequently appeared before the district judge and agreed to withdraw their motions for summary judgment and to present the matter on a stipulated record to the court for decision as a bench trial. The district judge ordered a consolidation of the preliminary injunction hearing with the bench trial pursuant to Rule 65 of the Federal Rules of Civil Procedure, and on December 16, 2003, the matter was taken on submission. On

February 18, 2004, the district court ruled in favor of Respondents on all claims. Petitioners appealed.[2]

On February 2, 2006, a divided panel of the Second Circuit affirmed. The dissenting circuit judge issued a lengthy opinion on the Establishment Clause issue, arguing that the majority "effectively turn[ed] a blind eye" to controlling precedent and concluding that the challenged policy "fails under the endorsement prong of the *Lemon* test, both on its face and as applied." App. 83a. (dissent).

Petitioners timely filed a petition for panel rehearing and a petition for rehearing en banc on the Establishment Clause issue. On May 25, 2006, the petitions were denied.

REASONS FOR GRANTING THE PETITION

I. THE CONSTITUTION FORBIDS PRACTICES THAT SUGGEST A DENOMINATIONAL PREFERENCE, SUCH AS THE POLICY AT ISSUE.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Thus, this Court has "expressly required 'strict scrutiny' of practices *suggesting* 'a denominational preference.'" *County of Allegheny v. ACLU,* 492 U.S. 573, 608-09 (1989) (citation omitted) (emphasis added); *see also Edwards v. Aguillard,* 482 U.S. 578, 593 (1987) (showing a "preference" for particular religious beliefs violates the Establishment Clause).

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[2] The Second Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

This Court has made clear that when evaluating claims under the Establishment Clause "the Constitution also requires that we keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded and guard against other different, yet equally important, constitutional injuries." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (internal citation omitted). One is plainly the passage by the government of a policy that creates divisiveness along religious lines in the special context of public elementary and secondary schools. *See id.*

Because Respondents' policy *suggests a denominational preference*, application of the strict scrutiny standard in light of the special context of public elementary and secondary schools compels a finding of unconstitutionality. *See Edwards*, 482 U.S. at 583-84 (applying the Establishment Clause with special sensitivity in the public-school context).

The policy at issue states, in relevant part, "The display of secular holiday symbol decorations is permitted. Such symbols include, but are not limited to, Christmas trees, Menorahs, and the Star and Crescent." App. 9a. (emphasis in the original). As stipulated to by Respondents, this policy does *not* permit the public display of *any* nativity scene or crèche by school officials or as part of a school-authorized holiday or seasonal display in the New York City public schools.[3] It prohibits the display of a simple picture of the

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[3] *See Lynch v. Donnelly*, 465 U.S. 668, 680 & 686 (1984) ("The crèche in the display depicts the historical origins of this traditional event [i.e., Christmas] long recognized as a National Holiday" and "[t]o forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by

nativity. *See, e.g.*, App. 157a (picture of the nativity). And it even prohibits students from drawing or coloring pictures of the nativity during classroom instruction, even though students receive books with the menorah for that purpose. App. 15a.

Yet, the policy expressly permits the public display of the menorah and the star and crescent, religious symbols of the Jewish and Islamic faiths respectively. This includes a freestanding, three-dimensional menorah prominently displayed in the main office of a public school.[4]

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paid chaplains would be a stilted over-reaction contrary to our history and to our holdings").

[4] Pursuant to this policy, Respondents displayed in the main administrative office of a public school attended by Petitioner Skoros's child a three-dimensional menorah standing next to a tree. *See* App. 158a (photograph of menorah display). The menorah, which included a Star of David, was the prominent element in this display, and there was no explanatory plaque. *See County of Allegheny*, 492 U.S. at 617-619 (finding that the tree was the "predominant element in the city's display" and noting that the city's display contained an "explanatory plaque," which was a significant factor in upholding the constitutionality of the display). Combine these facts with the fact that this display was made pursuant to an official policy that prohibits the similar display of Christian religious symbols, and it is clear that this display does not withstand constitutional scrutiny, *see id.* at 620 n.69 (noting that the combined display of a Christmas tree and a menorah may not be constitutional wherever it is located on government property; "[f]or example, when located in a public school, such a display might raise additional constitutional considerations") (Blackmun, J.), further demonstrating the inability of the endorsement test to achieve consistent results. *See* section III, *infra*.

Respondents do not permit the display of the nativity scene or crèche in any form during the various seasonal displays, including Christmas displays, because they claim that a nativity scene or crèche is a "purely religious" symbol. App. 22a. Respondents permit the display of the menorah and the star and crescent as part of school-approved displays because they claim that these are "secular" symbols, as stated in the policy.

As the majority properly points out, Respondents' policy "mischaracterizes" the menorah and star and crescent as secular symbols.[5] App. 81a-82a. Nonetheless, the majority simply excuses Respondents for this canard, referring to it as an "interpretive error."[6] App. 41a. As a result, Respondents' discriminatory policy—which is applied in our Nation's largest public school system—now has the backing of a federal appellate court.

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[5] The dissent properly notes that this aspect of the policy is itself unconstitutional because it "risks excessive entanglement inasmuch as it adopts an official State position on a point of religious doctrine by defining a menorah and star and crescent as secular symbols, and a 'crèche' as 'purely religious.'" App. 84a; *see also* App. 117a (dissent) (citing *Commack Self-Service Kosher Meats v. Weiss*, 294 F.3d 415, 423, 427 (2d Cir. 2002) (holding that the State's defining "kosher" as "prepared in accordance with orthodox Hebrew religious requirements" violated the First Amendment because it suggested a "preference for the views of one branch of Judaism")). The violation of the third prong of the *Lemon* test (excessive entanglement) is grounds for granting this petition.

[6] The Catholic League pointed out this "interpretive error" to Respondents on numerous occasions prior to the filing of this lawsuit. *See* App. 10a-12a. Petitioners further demonstrated Respondents' prevarication throughout the course of this litigation, both in the legal briefing and in expert testimony—to no avail.

Given the majority's recognition that the menorah and the star and crescent are indeed religious symbols, the majority's decision approves, in essence, the following public school policy:

> The display of religious holiday symbol decorations for Jews and Muslims is permitted. Such symbols include Menorahs and the Star and Crescent. The display of religious holiday symbol decorations for Christians is not permitted. Only the display of secular holiday symbol decorations is permitted for Christian holidays. Such symbols include Christmas trees.

Thus, this "hypothetical" policy, according to the majority, does not violate the Establishment Clause.

Remarkably, the majority reached its decision in this case despite the fact that the Second Circuit had previously recognized that "[t]he rationale behind the requirement of neutrality is, in part, that governmental actions giving even the appearance of favoring one religion over another are likely to cause divisiveness and disrespect for government by those who hold contrary beliefs." *Parents Ass'n of P.S. 16 v. Quinones,* 803 F.2d 1235, 1240 (2d Cir. 1986).

In the final analysis, New York City's public school policy crosses the line of constitutionality by drawing lines along religious grounds and *suggesting* a denominational preference for Jewish and Islamic religious symbols while disfavoring Christian symbols. This policy does not withstand strict scrutiny under the Establishment Clause.

II. NEW YORK CITY'S POLICY EXHIBITS HOSTILITY TOWARD THE CHRISTIAN RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE.

Petitioners do not seek the removal of religious symbols from the New York City public schools. *See* App. 4a-5a. Such intolerance toward religion is not required by the Constitution. Rather, Petitioners merely want the neutrality and accommodation that the Constitution demands.

In *Lynch*, this Court clearly articulated the principle of law applicable here:

> It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

Lynch, 465 U.S. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a *particular* religion or of religion in general.") (emphasis added).

With no hint of irony, the majority concluded that New York City's discriminatory policy achieved a valid "pedagogical endeavor" by "us[ing] children's natural excitement about various year-end holidays to teach the lesson of *pluralism* by showing children the rich cultural diversity of the city in which they live and by encouraging them to show *tolerance* and respect for traditions other than their own." App. 35a (emphasis added). Apparently, New York City's brand of "pluralism" and "tolerance" excludes Christianity. Moreover, the apparent "pedagogical endeavor" with regard to the Christian holiday of Christmas is to demonstrate to the impressionable, young students in the New York City public schools that this "tradition" has nothing to with the nativity. In sum, New York City's stated purpose for this policy—"to foster mutual understanding and respect for the many beliefs and customs stemming from our community's religious, racial, ethnic and cultural heritage"—is a sham. *See Edwards*, 482 U.S. at 587 (finding that the government's purpose was a sham because the policy did not promote—indeed, it undermined—the alleged educational goal).

As previously noted, our Constitution "affirmatively mandates accommodation, not merely tolerance of *all* religions, and forbids hostility toward *any*." *Lynch*, 465 U.S. at 673 (emphasis added). This case will afford this Court the opportunity to breathe life into this fundamental principle of constitutional law that is largely ignored by the lower federal courts, as this case demonstrates. Indeed, New York City should not be permitted to discriminate against the Christian religion in its public schools under the guise of "tolerance" and "pluralism." There is no affirmative action prong of the Establishment Clause—our Constitution demands tolerance of all religions, including Christianity. The challenged policy is plainly unconstitutional.

III. BY NOT VIEWING THE "EFFECT" OF NEW YORK CITY'S POLICY FROM THE PERSPECTIVE OF YOUNG AND IMPRESSIONABLE STUDENTS, THE MAJORITY HAS CREATED DECISIONAL CONFLICT ON AN IMPORTANT ISSUE OF FEDERAL LAW.

The "effect" analysis at issue here is the application of the second prong of the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Lynch*, 465 U.S. at 691-92 (O'Connor, J., concurring); *see also Santa Fe Indep. Sch. Dist.*, 530 U.S. at 307 n.21 ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.") (internal quotations and citations omitted). As this Court explained, "Since *Lynch*, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.'" *County of Allegheny*, 492 U.S. at 597 (citation omitted). In its present form, this "endorsement" test, as it is also known, precludes government from conveying or attempting to convey a message that a particular religion is favored or preferred, and it prohibits making adherence to a particular religion relevant in some way to a person's standing in the community. *See id.* at 593-94.

Under the endorsement test, the question presented by this case is whether a reasonable observer would find that the policy and its application in the public elementary and secondary schools of New York City have the effect of

endorsing a particular religion or religions or disfavoring a certain religion or religions. *See County of Allegheny*, 492 U.S. at 593-94. The identification of the reasonable observer and the amount of information attributable to this "objective" person is often dispositive, as the conflict between the majority and dissenting opinions in this case demonstrates. More fundamentally, this conflict demonstrates that the reasonable observer standard of the endorsement test is incapable of consistent application, and is, therefore, no standard whatsoever. *See, e.g., Van Orden v. Perry*, 125 S.Ct. 2854, 2867 (2005) (criticizing the reasonable observer standard and noting that "[t]he unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections") (Thomas, J., concurring); *County of Allegheny*, 492 U.S. at 669 ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us.") (Kennedy, J., concurring in judgment in part and dissenting in part); *see also Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995) (rejecting the application of the endorsement test and stating, "[T]he endorsement test does not supply an appropriate standard for the inquiry before us. It supplies no standard whatsoever. . . . And, of course, even when one achieves agreement upon [who the hypothetical beholder is], it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultrareasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield.") (Scalia, J., plurality opinion joined by Chief Justice Rehnquist and Justices Kennedy and Thomas).

As controlling precedent would *seem* to dictate, the reasonable observers in this case *should be* elementary school students (i.e., young and impressionable children) who are subjected to the inherently coercive atmosphere found in public elementary schools, *see Edwards*, 482 U.S. at 583-85, and their parents. *See* App. 98a-117a (dissent). As the majority noted, "[T]he schoolchildren for whose benefit these displays are created have no option but to view them and, sometimes, to participate in the craft projects that are integral to many of the displays." App. 62a.

However, the majority applied a fundamentally different reasonable observer standard by analyzing the purpose and effect of the challenged policy from the perspective of a disinterested adult. App. 44a-45a; *see also* 107a (dissent). The majority stated, "[W]e do not think the intended recipient of a display necessarily defines the objective observer." App. 46a. As such, the majority held that because "young schoolchildren cannot satisfy the requirements of an objective observer recently specified by the Supreme Court in *McCreary*, we conclude that such children cannot provide the model of the objective observer for purposes of *Lemon* analysis in this case." App. 46a-47a (emphasis added). This conclusion, which, according to the majority is based on this Court's decision in *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005), fundamentally conflicts with decisions from this Court and other federal courts of appeals in cases addressing Establishment Clause challenges arising in the public school context.[7] *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308

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[7] *See, e.g., Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 n* (4th Cir. 1998) (upholding constitutionality of school board policy permitting nonstudents to disseminate Bibles and other religious materials in public schools during school hours, except as

("[A]n objective Santa Fe High School *student* will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.") (emphasis added); *id.* ("The text and history of this policy, moreover, reinforce our *objective student's perception* that the prayer is, in actuality, encouraged by the school.") (emphasis added); *Lee v. Weisman*, 505 U.S. 577, 593 (1992) ("We do not address whether that choice [participating in the prayer or protesting] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place *primary and secondary school children* in this position.") (emphasis added); *Edwards*, 482 U.S. at 584, n.5 (distinguishing cases and holding that the potential for undue influence as between college students and grade school pupils is a "distinction [that] warrants a difference in constitutional results") (internal quotation marks and citation omitted); *see also Wallace v. Jaffree*, 472 U.S. 38, 66, n.9 (1985) (Powell, J., concurring) ("If it were necessary to reach the 'effects' prong of *Lemon*, we would be concerned primarily with the *effect on the minds and feelings of immature pupils.*") (emphasis added); *id.* at 81 (O'Connor, J., concurring) ("The Court's decisions have recognized a distinction when government-sponsored religious exercises are

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to elementary schools due to the "impressionability of young elementary-age children"); *Freiler v. Tangiapahoa Parish Bd. of Educ.*, 185 F.3d 337, 346 (5th Cir. 1999) ("In assessing the primary effect of the contested disclaimer, we focus on the message conveyed by the disclaimer to the *students who are its intended audience.*") (emphasis added); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 688-89 (7th Cir. 1994) (deciding Establishment Clause challenge to the school district's supplemental reading program and stating, "We are concerned, of course, with the *effect on the elementary school students* of using [the challenged reading series]") (emphasis added).

directed at *impressionable children* who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.") (emphasis added).

In fact, the majority's decision conflicts with decisions from its own Circuit.[8] This fact is further evidence that the majority viewed the *McCreary* decision as creating a sea change in the reasonable observer standard for Establishment Clause cases. And it further demonstrates the inconsistent application of this Establishment Clause test.

As noted by the dissent, "In failing to examine the displays and celebrations from the perspective of the students, the majority pays only lip service, and indeed, effectively turns a blind eye, to the significant impact of the students' impressionability and youth." App. 83a-84a (dissent).

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[8] Prior to the decision below, the Second Circuit had recognized that the "effects" of a challenged policy directed at public elementary and secondary school students must be viewed from the perspective of the impressionable young students. *See Quinones*, 803 F.2d at 1240-41 (stating that "[t]he concern for neutrality is nowhere more important than in education programs, for the government's activities in this area can have a magnified impact on *impressionable young minds*" and analyzing the "effect" of the City's plan "on the *minds of the youngsters attending P.S. 16*") (citation omitted) (emphasis added); *Brandon v. Board of Educ.*, 635 F.2d 971, 978 (2d Cir. 1980) ("Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an *impressionable student*, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is *too dangerous to permit*.") (emphasis added).

As the dissent points out, the majority's decision "approves a policy directed at the participation of public school children in a year-end holiday celebration that utilizes religious symbols of certain religions, but bans the religious symbol of another. . . . [T]he policy of the New York City Department of Education . . . to arrange for the children to celebrate the holiday season in schools through the use of displays and activities that include religious symbols of the Jewish holiday of Chanukah and the Muslim commemoration of Ramadan, but starkly exclude any religious symbols of the Christian holiday of Christmas, fails under the endorsement prong of the *Lemon* test, both on its face and as applied." App. 83a (dissent).

In the final analysis, the majority's decision materially alters the reasonable observer standard for Establishment Clause cases affecting public school students. Changing the "observer" from a young and impressionable student to a disinterested adult substantially alters the outcome of the case. *See, e.g., Edwards*, 482 U.S. at 584, n.5 (noting that a difference in the intended audience as between college students and secondary school students "warrants a difference in constitutional results") (internal quotation marks and citation omitted). If the Second Circuit is correct, the *McCreary* decision could potentially alter the precedential effect of cases such as *Edwards v. Aguillard*, *Lee v. Weisman*, and *Wallace v. Jaffree*. Moreover, the vastly different conclusions reached by the majority and the dissent demonstrate the inability of the endorsement test to achieve consistent results. Thus, review of this case is necessary to resolve the decisional conflict and to provide much needed guidance to the lower federal courts regarding the application of the Establishment Clause, particularly in the context of public elementary and secondary schools.

IV. THE MAJORITY FAILED TO PROPERLY CONSIDER THE PUBLIC SCHOOL CONTEXT OF THIS CASE IN CONFLICT WITH DECISIONS FROM THIS AND OTHER FEDERAL COURTS.

The "context" of the challenged governmental action is a material factor in the constitutional analysis under the Establishment Clause. *See, e.g., Van Orden*, 125 S.Ct. at 2863-64 (comparing the display of religious messages or symbols in the context of public elementary and secondary schools with other non-school contexts). The majority gave little weight to this important and often determinative aspect of the constitutional analysis, contrary to decisions from this and other federal courts.

The majority stated, "[W]e have no reason to conclude that the Supreme Court's decision in *Allegheny* about the pluralistic message conveyed by the inclusion of a menorah (or a star and crescent) in a multicultural holiday display applies with any lesser force when such a display appears in a public school rather than a public park." App. 52a. Thus, the majority equated the special context of this case with the very dissimilar context of a public park. This is contrary to the great weight of authority, including Justice Blackmun's opinion in the *Allegheny* case referenced by the majority. *See County of Allegheny*, 492 U.S. at 620 n.69 ("This is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations.") (Blackmun, J.) (citing *Edwards*, 482 U.S. at 583-84 (holding that the Establishment Clause must be applied with special sensitivity in the public-school context)); *Van Orden*, 125 S.Ct. at 2856 (holding that the Ten

Commandments display did not violate the Establishment Clause and distinguishing *Stone v. Graham*, 449 U.S. 39 (1980), which struck down the display of the Ten Commandments in public schools, stating, "neither *Stone* itself nor subsequent opinions have indicated that *Stone*'s holding would extend beyond the context of public schools . . . where the text confronted elementary school students every day"); *id.* at 2871 (Breyer, J., concurring) (upholding Ten Commandments display and noting that the display presented a much different context than one "on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state").

When evaluating claims under the Establishment Clause, context is critical and often dispositive. As stated by this Court, "[T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism *depends upon its context*." *County of Allegheny,* 492 U.S. at 597 (emphasis added). The context for this case is New York City public elementary and secondary schools, not Central Park.

As emphasized by this Court, "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). "'In no activity of the State is it more vital to keep out divisive forces than in its schools.'" *Edwards,* 482 U.S. at 584 (quoting *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J.)).

This Court has recognized that public schools present a special context. In *Edwards*, for example, this Court stated, "In this case, the Court must determine whether the Establishment Clause was violated *in the special context of the public elementary and secondary school system*." *Edwards*, 482 U.S. at 583 (emphasis added). This Court noted that it "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *id.* at 583-84, and when it employed the three-pronged *Lemon* test, it did so "mindful of the particular concerns that arise in [this] context," *id.* at 585.

In *Lee*, this Court stated, "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, *in a school context* may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 U.S. at 592 (emphasis added); *see also Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311 (holding that the election mechanism of the school policy was itself unconstitutional and stating that "[t]he mechanism encourages divisiveness along religious lines in *a public school setting*, a result at odds with the Establishment Clause") (emphasis added).

Throughout its Establishment Clause decisions, this Court carefully and deliberately considers the "special context" of public elementary and secondary schools because "[s]tudents in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards*, 482 U.S. at 584. *See also Lee*, 505 U.S. at 592 ("[T]here are heightened concerns with protecting freedom of conscience

from subtle coercive pressure in the elementary and secondary public schools.").

In fact, prior to the decision below, the Second Circuit had recognized that the heightened scrutiny applied in cases involving public schools was related to the protection provided impressionable students. In *Quinones*, the Second Circuit stated, "The concern for neutrality is nowhere more important than in *education programs*, for the government's activities in this area can have *a magnified impact on impressionable young minds*, providing a crucial symbolic link between government and religion, thereby enlisting—*at least in the eyes of the impressionable youngsters*—the powers of government to the support of the religious denomination." *Quinones,* 803 F.2d at 1240 (internal quotations and citations omitted) (emphasis added).

In summary, the special context of this case raises heightened concerns under the Establishment Clause that the majority disregarded, contrary to the decisions of this and other federal courts.

CONCLUSION

Because the majority's decision conflicts with decisions from this Court and other federal courts of appeals regarding the application of the Establishment Clause in the context of public elementary and secondary schools, consideration by this Court is therefore necessary to secure and maintain uniformity of decisions on an important issue of federal law. Moreover, as this and many other cases have demonstrated, the Establishment Clause jurisprudence of this Court is in need of substantial revision. This Court should grant review of this case and take the opportunity to abandon the

endorsement test in favor of a workable standard that is capable of consistent application.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 04-1229-cv

[Filed May 25, 2006]

SKOROS	)
	)
v.	)
	)
CITY OF NEW YORK	)
	)

On Appeal from EDNY (Brooklyn)
Case No. 02-cv-6439
Honorable Charles Sifton

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 25th day of May two thousand six.

Skoros v. Cityof New York 04-1229-cv

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Andrea Skoros, et al. Upon consideration by the panel that decided

the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to thejudges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/_____
Motion Staff Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 04-1229-cv

[Filed February 2, 2006]
As Amended, March 27, 2006

ANDREA SKOROS, individually, and next friend of NICHOLAS TINE, a minor and CHRISTOS TINE, a minor,
Plaintiffs-Appellants,

v.

CITY OF NEW YORK, JOEL L. KLEIN, in his official capacity as Chancellor, New York City Department of Education, and SONYA LUPION, individually, and in her official capacity as Principal, Edith K. Bergtraum School, New York City Department of Education,
Defendants-Appellees.

Before: FEINBERG, STRAUB, and RAGGI, Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Charles P. Sifton, *Judge*) in favor of defendants after a bench trial on the plaintiffs' constitutional challenges to New York City's holiday display policy for its public schools.

OPINION

REENA RAGGI, *Circuit Judge:*

No holiday season is complete, at least for the courts, without one or more First Amendment challenges to public holiday displays. At issue in this case is the holiday display policy promulgated by the Department of Education ("DOE") of the defendant City of New York ("City" or "New York") for the City's public elementary and secondary schools. That policy allows the menorah to be displayed as a symbol of the Jewish holiday of Chanukah and the star and crescent to be displayed as a symbol of the Islamic holiday of Ramadan, but it does not allow a crèche or nativity scene to be displayed as a symbol of the Christian holiday of Christmas. Plaintiff Andrea Skoros sues pursuant to 42 U.S.C. § 1983 on behalf of herself and her two minor children asserting that the policy violates her children's rights under the Establishment and Free Exercise Clauses of the First Amendment, as well as her parental right to control her children's religious upbringing and education as secured by the First and Fourteenth Amendments. *See* U.S. Const. amends. I, XIV. While Skoros's complaint seeks to enjoin the operation of the DOE holiday display policy, the record suggests that her goal is not so much to preclude defendants' use of the menorah or the star and crescent as it is to compel inclusion of the crèche in

public school holiday displays.[1]

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[1] To facilitate our discussion of Skoros's appeal, we briefly describe the three symbols at issue:

1. The menorah is a nine-branch candelabrum associated with Chanukah (sometimes spelled Hanukkah or Hanukah), a Jewish holiday, usually falling in December, that commemorates the Maccabees' triumph over the Seleucid Empire and the rededication of the Temple of Jerusalem. The menorah is used to celebrate a miracle connected to the Temple rededication whereby one day's supply of oil miraculously lasted for eight days. *See County of Allegheny v. ACLU*, 492 U.S. 573, 583 (1989) (plurality opinion) (Blackmun, J.,) (collecting sources). On each of the eight nights of Chanukah, the Jewish community lights a new branch of the menorah (with a candle, the shammash, held in a ninth branch) "to celebrate the miracle of a continuously burning light." *Kaplan v. City of Burlington*, 891 F.2d 1024, 1026 (2d Cir. 1989).

2. The star and crescent is a symbol of Islam sometimes associated with the sighting of the new moon at the start and finish of the holy month of Ramadan, a time of concentrated fasting, worship, and acts of charity. *See* Gordon D. Newby, *A Concise Encyclopedia of Islam*. "Hilal," 81 (2002); *see also The Oxford Dictionary of Islam*, "Hilal," 113 (John L. Esposito ed., 2003) (noting sighting of crescentmoon as important for determination of when certain Islamic religious practices must take place); Oxford Dictionary of World Religions, "Crescentmoon," 246 (John Bowker ed., 1997) (observing that Quran recognizes the waning of the moon "as a sign of God's unchanging purpose and control"). Ramadan takes place during the ninth lunar month of the Muslim year. In 2001-2002, the years here at issue, Ramadan fell during November and December.

After a bench trial, Judge Charles P. Sifton of the United States District Court for the Eastern District of New York rejected plaintiffs' constitutional claims on the merits and entered judgment in favor of the City, as well as co-defendants Joel L. Klein, sued in his official capacity as DOE Chancellor, and Sonya Lupion, sued individually and in her official capacity as the principal of the City's Edith K. Bergtraum elementary school ("P.S. 165"). *See Skoros v. City of New York*, No. CV-02-6439, 2004 U.S. Dist. LEXIS 2234 (E.D.N.Y. Feb. 18, 2004). Skoros now appeals that judgment, and the State of Alabama appears as *amicus curiae* to support her challenge. In urging affirmance, defendants have the support of the Anti-Defamation League as *amicus curiae*.

For the reasons stated in this opinion, we affirm the judgment of the district court. We emphasize at the outset that we do not decide on this appeal whether, consistent with the First Amendment, the DOE could ever include a crèche in a public school winter holiday display. We decide only that the

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3. The crèche or nativity scene is a visual depiction of Christ's birth in Bethlehem as recounted in the gospels. *See* Luke 2:1-21; Matthew 2:1-11. Generally, a crèche depicts Mary, Joseph, and the infant Jesus within a stable or cave setting, frequently surrounded by adoring shepherds, magi, angels, and animals. *See Webster's Third New International Dictionary (Unabridged)* 532 (1993). The Christmas crèche tradition is often attributed to St. Francis of Assisi. *See Lynch v. Donnelly*, 465 U.S. 668, 724 (1984) (Brennan, J., dissenting) (collecting sources). A crèche installed each December in the Metropolitan Museum of Art's medieval sculpture hall is among New York City's noteworthy holiday traditions. *See* Linn Howard, et al., *The Angel Tree: A Christmas Celebration* (1994).

defendants do not violate the Constitution when, in pursuing the secular goal of promoting respect for diverse cultural traditions, they do not include a crèche in such displays, representing Christmas through a variety of that holiday's well recognized secular symbols, even though Chanukah is represented by the menorah and Ramadan by the star and crescent.

I. Background

A. Plaintiff Skoros and Her Children

Plaintiff Andrea Skoros is a Roman Catholic raising her two minor sons, Nicholas and Christos Tine, in that faith. During the 2001-2002 school year, Nicholas was a third-grade student at New York City's P.S. 165. In the 2002-2003 school year, Nicholas attended fourth grade at P.S. 169, while his brother Christos attended second grade at P.S. 184. The boys remained in these public schools through the trial of this case.

B. The New York City Public School System

New York City has the largest public school system in the country, with over one million students enrolled in its 1200 public schools and programs. This student population, like the population of the City itself, represents virtually every race, nationality, ethnicity, and religious and cultural tradition in the world. City public school students speak 140 different primary languages, including Spanish, Chinese, Russian, Urdu, Bengali, Haitian-Creole, Arabic, Korean, Albanian, French, Punjabi, and Polish. More than 125,000 students are enrolled in programs to learn English.

C. The Challenged Holiday Display Policy

For some time, City educators have recognized the obvious: young schoolchildren are often excited toward the end of the year about approaching holidays. School officials decided that this excitement could be channeled constructively by using the variety of year-end holidays – including Christmas, Chanukah, Ramadan, and Kwanzaa[2] – to teach children about and to encourage respect for the different cultures in their community. Because some of the identified holidays have religious origins, questions arose as to what holiday symbols could appropriately be displayed in the public schools without appearing to endorse religion in violation of the First Amendment. To provide guidance, in 1997, the DOE Office of Legal Services, working in conjunction with the City Office of Corporation Counsel, developed a holiday display policy for the public schools.

The iteration of this policy here at issue is that memorialized in virtually identical memoranda dated November 28, 2001, and November 18, 2002, from the Chancellor's general counsel to all City public school superintendents and principals (hereafter referred to

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[2] Kwanzaa, which, in Swahili, means "first fruits of the harvest," is a nonreligious holiday created in 1966 to celebrate African-American family and social values. On each of Kwanzaa's seven days, from December 26 to January 1, families gather to exchange gifts and to discuss particular principles: unity, self-determination, collective responsibility, operative economics, purpose, creativity, and faith. On December 31, communities join together for a "karamu," or feast. *See* 7 *New Encyclopedia Britannica*, "Kwanzaa," 54-55 (15th ed. 1998); Eric V. Copage, *A World of Celebration; New York City: Kwanzaa*, N.Y. Times, Nov. 8, 1998, § 6, at 10.

collectively as the "Holiday Display Memo").[3] The first paragraph of the Holiday Display Memo states the purpose of the DOE policy:

> New York City is a diverse multi-cultural community. It is our responsibility as educators to foster mutual understanding and respect for the many beliefs and customs stemming from our community's religious, racial, ethnic and cultural heritage. In furtherance of this goal, we must be cognizant of and sensitive to the special significance of seasonal observances and religious holidays. At the same time, we must be mindful that the Constitution prohibits a school system from endorsing or promoting a particular religion or belief system.

Holiday Display Memo at 1. The memorandum proceeds to outline the "guidelines [that] should be followed with respect to the display of cultural/holiday symbols":

1. The display of secular holiday symbol decorations is permitted. Such symbols include, but are not limited to, Christmas trees, Menorahs, and the Star and Crescent.

2. Holiday displays shall not appear to promote or celebrate any single religion or holiday. Therefore, any symbol or decoration which may

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[3] The Holiday Display Memo deals only with seasonal displays, not with classroom instruction or religious expression by students in the school. The latter issue is the subject of a separate DOE Regulation, which is part of the record but not at issue in this case.

be used must be displayed simultaneously with other symbols or decorations reflecting different beliefs or customs.

3. All holiday displays should be temporary in nature.

4. The primary purpose of all displays shall be to promote the goal of fostering understanding and respect for the rights of all individuals regarding their beliefs, values and customs.

Id. (emphasis in original).

D. The Catholic League's Challenge to the Holiday Display Policy

Soon after the November 2001 dissemination of the Holiday Display Memo, the Catholic League for Religious and Civil Rights unsuccessfully petitioned the DOE to include the crèche in its list of approved symbols for holiday display in the public schools. Skoros submits that she was aware of and in agreement with the Catholic League's efforts and, therefore, did not independently pursue the matter with DOE officials.

According to a December 4, 2001 letter from Catholic League President William A. Donohue to then-Chancellor Harold O. Levy, the Chancellor initially denied the League's request to permit the display of a crèche in public schools because he understood the Supreme Court to have "'previously refused to permit erection of a nativity scene on public property.'" Donohue Letter to Levy, Dec. 4, 2001, at 2 (purporting to quote Levy). Donohue submitted that this misconstrued Supreme Court precedent, which only barred a

public display of a nativity scene in isolation, not in conjunction with secular holiday symbols. *See id.* (comparing *Lynch v. Donnelly*, 465 U.S. 668 (1984) with *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)). Donohue did not assert that the crèche was a secular rather than religious symbol. Instead, he insisted that the right to display religious symbols on public property had been recognized in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995). *See* Donohue Letter to Levy, Dec. 4, 2001, at 2.

In a subsequent letter dated December 14, 2001, Donohue challenged the DOE's characterization of the menorah and the star and crescent as secular symbols and asked for a clarification as to DOE policy regarding nativity scenes: "Are they secular or religious, and can they be displayed in the schools?" Donohue Letter to Levy, Dec. 14, 2001, at 1. The Chancellor's general counsel replied that "[t]he Supreme Court has recognized both the Menorah and Christmas tree as secular symbols of the holiday season. On the other hand, the Supreme Court has found that a nativity scene is not a secular symbol and, therefore, it is unconstitutional to display it on public property." Vignola Letter to Donohue, Dec. 20, 2001, at 1.

Over the next several months, Donohue and the Chancellor's general counsel continued to exchange letters debating the relevant case law on holiday displays. In an October 28, 2002 letter, counsel stated that Donohue's reliance on *Capitol Square* was misplaced because that case concerned the display of a religious symbol in a "public forum," which public schools were not. Vignola Letter to

Donohue, Oct. 28, 2002, at 1.[4] Counsel similarly asserted that the Supreme Court's approval of a crèche display in *Lynch* was limited to the particular facts of that case, which were not translatable to a public school setting. *See id.* Finally, counsel disputed Donohue's reading of *Allegheny*. He asserted that the religious symbol there at issue, a menorah, was recognized by the Court to have "both religious and secular dimensions," which was not the case with a crèche, which "is solely a religious symbol." *Id.* Further, counsel stated that the Supreme Court in *Allegheny* had "acknowledged that there is no more secular alternative symbol" to represent Chanukah, which the DOE concluded was not the case with Christmas. *Id.*

The net result was that, despite the Catholic League's protest, the DOE continued to disallow crèches from holiday displays in the City public schools.

E. The Holiday Displays in the Schools Attended by Skoros's Sons

1. December 2001 – P.S. 165

In December 2001, at which time Nicholas Tine attended P.S. 165, a temporary holiday display in the front lobby of that school included a 1 ½ foot Christmas tree, a one-foot

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[4] At issue in Capitol Square was a cross erected by the Ku Klux Klan. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 758.

menorah, a similarly sized star and crescent,[5] and a kinara.[6] Red plastic was hung on a lobby wall to make the wall appear to be a large gift box tied with red ribbon. An American flag was affixed to the ribbon, as well as a gift tag stating, "A gift of liberty and justice for all."

2. December 2002 – P.S. 184

In December 2002, at which time Christos Tine attended P.S. 184, a holiday display in that school lobby included a large, "festively decorated Christmas tree," next to which stood a small table "with several dreidels[7] and three paper menorahs, one with a sign stating 'Happy Hanukah.'" *Skoros v. City of New York*, 2004 U.S. Dist. LEXIS 2234, at *7 (footnote added). "[F]ive dreidels and two kinaras" were also displayed on the walls adjacent to the Christmas tree and table *id.* At the rear entrance to P.S. 184, a more modest holiday display had two large snowflakes hanging from the ceiling, while student artwork on the walls depicted six paper

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[5] This appears to be the only display of the star and crescent in evidence in this case.

[6] A kinara is a seven-branched candelabrum that is lit during Kwanzaa. The colors of the candles – three red, three green, and one black – represent, for example, self-determination, collective work and responsibility, and unity. *See* 7 *New Encyclopedia Britannica*, "Kwanzaa," 55; Antoinette Broussard, *African-American Holiday Traditions* 142-43 (2000).

[7] A dreidel is a spinning top with four sides, each of which is inscribed with a different Hebrew letter. Together, the letters abbreviate a sentence that refers to the Chanukah miracle. *See County of Allegheny v. ACLU*, 492 U.S. at 585 (plurality opinion) (Blackmun, J.).

Christmas wreaths framing students' written work, four dreidels, and a kinara.

Christos's own classroom was decorated with a variety of student art projects. The district court accurately described the display, which is memorialized in a series of photographs, as follows:

> Hanging by clothespins from a line strung across the classroom are student-created, three-dimensional paper Christmas wreaths and dreidels and at least one drawing of a kinara. Affixed to tables and chairs in the classroom are student-created stockings, with a name on each, presumably the students' names. There is also a paper wreath made of alternating snowmen and Christmas trees topped with a Star of Bethlehem affixed to a wall, as well as a display of snowmen under "A Winter Wonderland" sign.

Id. at *8 (internal citations omitted).

A calendar for the month of December also hung in the classroom. At the top, it depicted Santa Claus in his sleigh pulled by reindeer. Each day of the month was noted in a cut-out figure of either a snowman, Christmas tree, or dreidel.[8]

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[8] Skoros complains that the calendar square for December 25, Christmas day, depicted the date in a dreidel. The calendar did not link particular holidays to particular dates and no evidence was adduced indicating that the use of a dreidel on December 25 was a product of anything other than the random placement of the three symbols used to decorate the calendar. Thus, December 24, Christmas Eve, was marked with a Christmas tree, and December 26, the first day of Kwanzaa, with a snowman. The dates December 1 through 6, coinciding with the last six days of Chanukah, were

Skoros alleged that, as one class project, Christos had been required to make a menorah, but the district court found that assertion unsupported by the record. *See id.* at *13. The evidence indicates that Christos's teacher did give children a Chanukah booklet, with text describing the origin of the dreidel and latkes[9] and black-and-white illustrations, including a cover depiction of a menorah, boldly outlined as in a coloring book. Christos's teacher asked the children to color the booklets, but she did not check to see whether they had done so nor did she display any pictures from the booklets in class. *See* Dahan Aff. at 2-3. Skoros did not object to the booklet. Indeed, in a letter to Christos's teacher, she stated that she thought her son had done a "fantastic" job coloring the menorah and that she had played the dreidel game with him. Skoros Letter to Dahan, Dec. 9, 2002. She did, however, note that "[a] menorah is a religious symbol," and inquired whether the children would be coloring any religious symbols for Christmas. *Id.* In response, Christos's teacher advised Skoros that the children had made Christmas wreaths and stockings, which now decorated their classroom. She forwarded a copy of the DOE Holiday Display Memo, noting its focus on secular holiday symbols and its identification of the menorah as a permissible secular symbol. *See* Dahan Letter to Skoros (undated).

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depicted using all three symbols.

[9] Latkes are potato pancakes customarily served during Chanukah because the oil in which they are fried serves as a reminder of the miracle of oil associated with Chanukah. *See County of Allegheny v. ACLU*, 492 U.S. at 585 n.26 (plurality opinion) (Blackmun, J.) (citing M. Strassfeld, *The Jewish Holidays* 168 (1985)).

3. December 2002 – P.S. 169

In December 2002, at which time Nicholas Tine attended P.S. 169, that school's holiday decorations included a wall display depicting a row of reindeer with shiny red noses, scattered five-pointed stars, two single candles, gingerbread boys, a Christmas tree, and a dreidel, all beneath a heading stating "Songs, Symbol[s], Signs of the Season." Other walls showed students' written work interspersed with art projects including cotton ball snowmen and brightly colored Santa Claus faces. The Santa display bore a heading stating "Let It Snow!"

Yet another wall display highlighted seasonal books and related student artwork. A card referencing the book *Rudolph the Red-Nosed Reindeer* was placed amidst a herd of cheerful, brown-bag reindeer, with red ball noses, ribbon bowties, and flower-strewn antlers. A card referencing *The Gingerbread Baby* was placed with brightly colored gingerbread boys and girls dancing under a Christmas tree made from a mass of green-colored cut-outs of children's hand tracings. A card for *The Chanukah Guest* was placed with paper and stuffed teddy bears sporting bright red scarves and carrying small dreidels in one hand and a frying pan with latkes in the other. Elsewhere in the school, a large snowman sat on a stage atop decorated gift boxes.

In the school office, a small decorated Christmas tree shared the counter with a smaller menorah, and, at least for some time, with a bowl of fruit representing Kwanzaa.[10] An

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[10] Although Skoros asserts that this menorah was placed in the office window and lit, the school principal denies the assertion. *See* Kunin Aff. at 2.

office desk, one side of which depicted Santa Claus in his sleigh full of gifts, was festooned with multicolored lights. A red garland and white lights decorated the windows of another school room, while large candy canes, a Santa face, a Kwanzaa sign, and a dreidel hung from the ceiling.

In Nicholas's classroom, cards on the wall described four holidays: Kwanzaa, Christmas, Ramadan, and Chanukah.[11]

The Kwanzaa card stated:

> Kwanzaa is the holiday when African Americans celebrate their cultural heritage. It was created in 1966 by Dr. Maulana Karenga, an African American who wanted his people to have a special time to celebrate and learn about their cultural origins. Kwanzaa is celebrated from December 26 through January 1. Families and friends gather to remember their ancestors and to enjoy African music, dancing, poetry, and foods. The holiday has seven days, seven symbols, and seven principles. The principles correspond to the seven days of the celebration and serve as guides for daily living.
>
> Each night, during Kwanzaa, everyone drinks from the *kikombe,* or unity cup. The first person who raises

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[11] The record does not indicate whether these cards were also displayed in other classrooms, but that inference appears reasonable given that the items are a published teaching aid rather than the creation of an individual teacher. In any event, the card display establishes that the challenged DOE policy did not preclude respectful verbal acknowledgments of the religious origins of certain winter holidays or of the fact that nativity scenes are used by some persons in celebrating Christmas.

the cup says "Harambee," a Swahili word that means "Let's all pull together." What are other symbols of Kwanzaa?

The Christmas card stated:

Christmas, December 25, is the Christian holiday that celebrates the birth of Jesus Christ. This holy time is marked by Nativity scenes, caroling, and church services where Christians hear again the story of the birth of the baby Jesus. Christmas includes many festive customs such as decorating homes and evergreen trees with colored lights, bright ribbons, and shining ornaments. People hang stockings by the fireplace, send Christmas cards to friends near and far, and wrap carefully chosen gifts for their loved ones. The jolly figure of Santa Claus is the bringer of gifts in this happy season.

The Christmas tree is one of the many popular symbols of this holiday. People put gifts under the trees after they decorate them with lights and ornaments. What other Christmas symbols can you name?

The Ramadan card stated:

Ramadan, the ninth month of the Muslim calendar, is a holy month for Muslims, believers in the religion Islam. During Ramadan, Muslims fast (take no food or drink) from dawn to sunset. It is a very spiritual time for Muslims. They arise early for a pre-dawn meal. At the end of the day, the fast is broken by taking the *Iftar* meal, often with friends or family invited into one another's homes. When the new moon

appears and the month of Ramadan is over, Muslims celebrate a joyous holiday called *Eid-ul-Fitr* (Festival of Fast-Breaking). They dress in their best clothing for prayers at the mosque and celebrate with family and friends.

On *Eid-ul-Fitr,* Muslims often visit one another's homes with gifts of sweets, nuts, or coins. The festival is a happy end to the holy month of Ramadan. How is Ramadan like *your* winter holiday celebrations?

The Chanukah card stated:

Hanukkah is celebrated by Jews in remembrance of a great victory, which won them the right to practice their religion. Also called the Festival of Lights, Hanukkah lasts for eight days because the oil in the Hanukkah story lasted that long. Candles are lit each evening during the eight days of Hanukkah. The candle holder is called a *menorah.* It holds eight candles and one servant candle, which is used to light the others - one more candle each night of Hanukkah. Some children receive gifts on each of the eight nights of Hanukkah. They play *dreidel* games and enjoy special Hanukkah foods.

Spinning a *dreidel,* a four-sided top, is a favorite game for children during Hanukkah. The letters on the four sides of the dreidel are the first letters of a Hebrew sentence that means "A great miracle happened there." What is the miracle?

F. District Court Proceedings

1. Plaintiffs' Complaint

Skoros filed the instant lawsuit on December 29, 2002. In an amended complaint, filed February 28, 2003, she charged that the City's holiday display policy, on its face and as applied by the named defendants, "impermissibly promoted and endorsed the religions of Judaism and Islam, conveyed the impermissible message of disapproval of Christianity, and coerced students to accept the Jewish and Islamic religions in violation of the Establishment Clause of the First Amendment." Am. Compl. at 7, ¶ 22. She further alleged that the defendants had violated the Free Exercise Clause of the First Amendment by coercing her sons "to accept the Jewish and Islamic religions and to renounce [their] Christian religion." *Id.* at 8, ¶ 25. Finally, she asserted that these actions infringed her own right "to control the religious upbringing and education of her children" in violation of the First and Fourteenth Amendments. *Id.* at 9, ¶ 28. In relief, Skoros sought (1) a declaratory judgment that the defendants had violated her own and her sons' constitutional rights, as pleaded in the amended complaint; (2) a permanent injunction enjoining defendants from further implementing the challenged holiday display policy in the City's public schools; and (3) an award of nominal damages, attorneys' fees, and costs. *See id.* at 9-10.

2. The Bench Trial

In October 2003, both sides moved for summary judgment. On December 4, 2003, they withdrew these motions and agreed to have the case tried to the bench on a stipulated record. After reviewing the parties' joint submission, which included numerous affidavits and exhibits,

the district court issued a detailed 36-page decision on February 18, 2004, awarding judgment in favor of the defendants. *See Skoros v. City of New York*, 2004 U.S. Dist. LEXIS 2234.

a. The Establishment Clause Claim

The district court concluded that Skoros's Establishment Clause challenge failed because the DOE holiday display policy, on its face, satisfied the three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (requiring challenged action to (1) have a valid secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive state entanglement with religion).

The district court found that the stated purpose of the policy was secular: "'to foster mutual understanding and respect for the many beliefs and customs stemming from our community's religious, racial, ethnic and cultural heritage.'" *Skoros v. City of New York*, 2004 U.S. Dist. LEXIS 2234, at *21 (quoting Holiday Display Memo at 1). To the extent Skoros argued that this purpose statement masked the defendants' true goal to denigrate Christianity by secularizing Christmas and to promote Judaism and Islam, the district court found "no evidence" in the record "to establish such an insidious purpose." *Id.* at *22. It noted that the Supreme Court had construed the Establishment Clause to "'confin[e] the government's own celebrations of Christmas to the holiday's secular aspects.'" *Id.* at *26-27 (quoting *County of Allegheny v. ACLU*, 492 U.S. at 611). It further concluded that

> [w]ithout a diversity policy a winter holiday display in New York City's public schools would be dominated by images representative of Christmas. . . . The DOE

> policy, permitting the inclusion of symbols of Kwanzaa, Chanukah, and Ramadan in addition to Christmas, is thus an attempt to diversify the season so that children who do not celebrate Christmas can participate in the seasonal celebration and can learn about cultures different from their own without trespassing on their own religious beliefs.

Id. at *23-25.

At the second step of the *Lemon* analysis, the district court ruled that the primary effect of the school display policy was secular: "celebrating the diversity of the winter holiday season." *Id.* at *37. It concluded that no objective observer would perceive the policy's effect to be that asserted by Skoros, that is, an endorsement of Judaism and Islam and a manifestation of hostility toward Christianity.

The court specifically found that the DOE had not singled out the crèche for exclusion from school holiday displays. Rather, it excluded all symbols that, like the crèche, were "purely religious." *Id.* at *35. At the same time, it allowed symbols with religious origins to be used in holiday displays if they had "developed significant secular connotations." *Id.* at *30. The district court explained that an objective observer would perceive this distinction as reasonable because, when symbols had acquired "significant secular dimensions," a school could more easily use them "in a prudent and objective manner, as a teaching aid" in "the advancement of a secular program of education, and not of religion." *Id.* at *31. Although the district court made no specific findings with respect to the menorah and the star and crescent, it apparently concluded that these symbols had acquired secular significance. *See id.* at *33.

Finally, the district court concluded that the entanglement prong of the Lemon test required little discussion because the DOE's attempt to design a uniform holiday display policy ensured that it did not need "to police each and every display in every public school year after year." *Id.* at *38.

Insofar as Skoros challenged the DOE holiday display policy as applied to particular displays at the public schools attended by her sons in December 2001 and 2002, the district court ruled that no child, viewing the "dizzying array of holiday symbols" included in the displays, would conclude that the school was endorsing or coercing the practice of "Judaism or Islam over Christianity." *Id.* at *42-43. Rather, "the context of these holiday displays" satisfactorily "neutralized the religious dimensions of the menorah and the star and crescent" so that "a reasonable Christian child . . . would not perceive religious endorsement or coercion but 'a celebration of the diversity of the holiday season, including traditional religious and secular symbols of that season.'" *Id.* at *43 (quoting *Elewski v. City of Syracuse*, 123 F.3d 51, 55 (2d Cir. 1997)).

b. The Free Exercise Clause Claim

The district court also rejected Skoros's Free Exercise claim as without merit. Reiterating that the holiday displays at issue "conveyed an inclusive message, did not advance or promote any particular religion, and did not coerce [Skoros's sons] to reject Christianity," the court concluded that the boys' "passive exposure to and even their participation in the creation of the displays, including symbols from several different religious and cultural holidays, do not interfere with their ability to practice their own faith." *Id.* at *47-48. It reached the same conclusion with respect to any lessons about the religious origins of any of the holiday symbols displayed,

because the "secular manner" in which the evidence indicated they were presented did not interfere with Skoros's sons ability to practice their own faith. *Id.* at *48.

c. The Parental Rights Claim

Acknowledging that the First and Fourteenth Amendments afforded Skoros the right to direct the religious upbringing and education of her children, the district court concluded that there was no violation of that right because the evidence simply did not support her claim that defendants sought to coerce her children "to accept the Jewish and Islamic faiths and renounce Christianity." *Id.* at *49.

II. Discussion

A. The Standard of Review

On appeal from a bench trial, we generally review a district court's findings of adjudicative fact only for clear error and its conclusions of law, or mixed fact and law, *de novo*. *See Elewski v. City of Syracuse*, 123 F.3d 51, 53, 55 (2d Cir. 1997) (holding that district court's finding of "a secular purpose for the crèche as part of the entire display . . . [was] not clearly erroneous"); *accord Natl Mkt. Share, Inc. v. Sterling Nat'l Bank, Inc.*, 392 F.3d 520, 528 (2d Cir. 2004); *cf. Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (holding that "the District Court's inference, drawn from the religious nature of the crèche, that the City has no secular purpose was, on this record, clearly erroneous"). Where, as here, a case is tried on a stipulated record, our review is de novo because the district court's rulings are necessarily conclusions of law or mixed fact and law. *See General Elec. Co. v. Comm'r*, 245 F.3d 149, 154 (2d Cir. 2001); *accord McCormick v. Sch. Dist. of Mamaroneck*, 370

F.3d 275, 283 (2d Cir. 2004); *see also ACLU v. Florissant*, 186 F.3d 1095, 1097 (8th Cir. 1999) (applying de novo review to holiday display case tried on stipulated record).

B. The First Amendment Religion Clauses and Public Displays Incorporating Religious Symbols

The First Amendment famously states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The dual mandate of these Establishment and Free Exercise Clauses extends to state and local governments through the Fourteenth Amendment. *See* U.S. Const. amend. XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact . . . laws [contrary to the First Amendment's religion clauses].").

Skoros submits that New York City's holiday display policy for its public schools violates both religion clauses of the First Amendment. In reviewing plaintiffs' claims, we confront the challenge of frequently splintered Supreme Court decisions on the constitutionality of public displays involving religious symbols. Although the Court has never construed the religion clauses to require government "to purge from the public sphere all that in any way partakes of the religious," *Van Orden v. Perry*, 125 S.Ct. 2854, 2868 (2005) (Breyer, J., concurring in the judgment), its members have rarely agreed – in either analysis or outcome – in distinguishing the permissible from the impermissible public display of symbols having some religious significance.

The Supreme Court first addressed the issue of public holiday displays in 1984 in *Lynch v. Donnelly*, 465 U.S. 668. Splitting five to four, the Court held that a crèche displayed

in a park together with various secular holiday symbols did not violate the First Amendment. The majority ruled that the purpose and effect of the challenged display could not fairly be determined by focusing only on the crèche. *See id.* at 679-80. Rather, the crèche had to be assessed in the context of the overall holiday display, which was reasonably understood to serve the legitimate secular purpose of depicting the origins of a national holiday. *See id.* at 680-81.

Five years later, in *County of Allegheny v. ACLU*, 492 U.S. 573, the Court considered a different holiday display, with a crèche featured in a courthouse lobby, somewhat removed from secular holiday symbols exhibited elsewhere in the building. Once again, the Court divided five to four in holding this display unconstitutional because, "unlike in *Lynch*, nothing in the context of the [courthouse] display detracts from the crèche's religious message." *Id.* at 598.

The crèche was not the only religious symbol whose public display was at issue in *Allegheny*. A First Amendment challenge was also raised to a menorah displayed outside another public building together with a Christmas tree and a sign saluting liberty. On this issue, six justices agreed that the combined menorah-Christmas tree display did not violate the Establishment Clause. This group of six, however, produced three different opinions, none of which commanded a majority of the Court. *See id.* at 613 (opinion of Blackmun, J.); *id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part). Four justices concluded that passive religious displays, whether of a crèche or a menorah, were constitutionally permissible because they did not compel anyone "to observe or participate in any religious ceremony or activity." *Id.* at 664 (Kennedy, J., concurring in the judgment in part and

dissenting in part). Both Justice Blackmun and Justice O'Connor, however, insisted that the Establishment Clause reached beyond coercion to prohibit government endorsement of religion. *See id.* at 619-20 (opinion of Blackmun, J.); *id.* at 635-36 (O'Connor, J., concurring in part and concurring in the judgment).[12]

While Justices Blackmun and O'Connor recognized the menorah as a religious symbol that could communicate government endorsement of Judaism if displayed by itself, they concluded that the menorah did not convey this impermissible message in the context of the challenged display. *See id.* at 616 n.64 (opinion of Blackmun, J.); *id.* at 634 (O'Connor, J., concurring in part and concurring in the judgment). For Justice Blackmun, the placement of a menorah "in the shadow of the [Christmas] tree" communicated "a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition." *Id.* at 617-18 (opinion of Blackmun, J.). The sign saluting liberty reinforced the display's secular message by "linking that theme with this Nation's legacy of freedom, which allows an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise." *Id.* at 619. Further, Justice Blackmun observed that no less religious symbol was reasonably available to represent Chanukah. *See id.* at 618 ("An 18-foot dreidel would look out of place [beside a 45-foot Christmas tree] and might be interpreted by some as mocking the celebration of

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[12] In analyzing the crèche display in *Allegheny*, a majority of the Court adopted the endorsement test, which "precludes government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *County of Allegheny v. ACLU*, 492 U.S. at 593 (internal quotation marks and alteration omitted).

Chanukah."). Justice O'Connor did not think endorsement analysis required consideration of more secular alternatives for a challenged religious symbol. *See id.* at 636 (O'Connor, J., concurring in part and concurring in the judgment). She concluded simply that "a reasonable observer" of the display would understand that the defendants, by using "a secular symbol of the Christmas holiday season rather than a religious one," together with a religious symbol such as the menorah, were "acknowledg[ing] the cultural diversity of our country" and conveying the permissible secular message of "tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in different ways by our citizens." *Id.* at 635-36.

The passage of time has not produced greater consensus on the Court in resolving First Amendment challenges to public displays of religious symbols. Last term, ten separate opinions were filed in two cases, one of which held that the Establishment Clause was not violated by a long-standing public display of the Ten Commandments, *see Van Orden v. Perry*, 125 S.Ct. at 2858 (plurality opinion) (Rehnquist, C.J.); *id.* at 2864 (Scalia, J., concurring); *id.* at 2864 (Thomas, J., concurring); id. at 2868 (Breyer, J., concurring in the judgment); *id.* at 2873 (Stevens, J., dissenting); *id.* at 2892 (O'Connor, J, dissenting); *id.* at 2892 (Souter, J., dissenting), and the other of which ruled that the Clause was violated by a different Ten Commandments display with a background of endorsement, *see McCreary County v. ACLU*, 125 S.Ct. 2722 (2005); *id.* at 2746 (O'Connor, J., concurring); *id.* at 2748 (Scalia, J., dissenting).

Government officials attempting to parse these sharply divided public display decisions might be forgiven for occasionally thinking, as do some of the justices, that they confront a "jurisprudence of minutiae" that leaves them to

rely on "little more than intuition and a tape measure" to ensure the constitutionality of public holiday displays. *County of Allegheny v. ACLU*, 492 U.S. at 674-75 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also Elewski v. City of Syracuse*, 123 F.3d at 57 (Cabranes, J., dissenting) (citing Justice Kennedy's *Allegheny* opinion in noting challenge of "intensive fact-specific analyses" required in applying endorsement test to holiday display cases); *see also ACLU v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) (Alito, J.) (observing that the Supreme Court's religious display decisions "have been marked by fine line-drawing," so that "it is not easy" for public officials "to determine whether particular displays satisfy the Court's standards"). The concern calls to mind Justice Jackson's observation that the metaphorical wall of separation between church and state erected by the Establishment Clause, *see* 8 *The Writings of Thomas Jefferson* 113 (H. Washington, ed., 1861), can appear "as winding as the famous serpentine wall" designed by Jefferson for the University of Virginia, *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 238 (1948) (Jackson, J., concurring); *see also Wallace v. Jaffree*, 472 U.S. 38, 91-108 (1985) (Rehnquist, J., dissenting) (criticizing "wall" metaphor). No matter. Officials who authorize public holiday displays, like the lower courts that must rule on their constitutionality, are obliged to strive in good faith to identify and apply the principles of law controlling these Supreme Court decisions.

Following that mandate, a divided panel of this court, in *Kaplan v. City of Burlington*, 891 F.2d 1024, 1030 (2d Cir. 1989), ruled that a menorah displayed by itself in a public park violated the Establishment Clause. On the other hand, in *Elewski v. City of Syracuse*, another divided panel concluded that a crèche could constitutionally be displayed in a town square, because a reasonable observer would view that

display together with secular holiday decorations on the town's nearby main streets and a menorah in a neighboring square and would perceive the totality of holiday symbols as "a celebration of the diversity of the holiday season, including traditional religious and secular symbols of that season." 123 F.3d at 55. Moreover, the observer would understand the "principal purpose of that celebration [to be] to preserve the economic viability of downtown retailers." *Id.*

With the challenge of our own divided precedent as well as that of the Supreme Court in mind, we now confront the constitutionality of holiday displays in a different and more difficult context: public elementary and secondary schools.

C. Skoros's Establishment Clause Challenge

In addressing Establishment Clause challenges, the Supreme Court has observed that "[t]he First Amendment contains no textual definition of 'establishment,'" and that the term itself is "not self-defining." *McCreary County v. ACLU*, 125 S.Ct. at 2742; *see Lemon v. Kurtzman*, 403 U.S. at 612 (describing language of Establishment Clause as "opaque"). Most obviously, the Clause prohibits the establishment of a national or state church, but the Court has never construed its mandate to apply only to this most obvious proscription. *See Lemon v. Kurtzman*, 403 U.S. at 612 (observing that a prohibition on laws relating to religion necessarily extends beyond the establishment of a national church); *accord McCreary County v. ACLU*, 125 S.Ct. at 2742. It has long been accepted that the Establishment Clause prohibits government from officially preferring one religious denomination over another: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see McCreary County v.*

ACLU, 125 S.Ct. at 2733; *Gillette v. United States*, 401 U.S. 437, 449-50 (1971); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

Skoros submits that the City's holiday display policy violates this neutrality command by officially promoting and endorsing Judaism and Islam and by conveying disapproval of Christianity. *See* Am. Compl. at 7, ¶ 22. Like the district court, we find no record support for this argument.

1. The Applicability of the *Lemon* Test

In identifying the standard of review applicable to Skoros's Establishment Clause challenge, we begin with a preliminary word about "neutrality." In recently reiterating that neutrality is the "touchstone" of First Amendment analysis, *McCreary County v. ACLU*, 125 S.Ct. at 2733, the Supreme Court noted that the principle provides a "sense of direction" in evaluating the variety of problems that can arise under the Establishment Clause, *id.* at 2742. Specifically, neutrality serves "to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate." *Id.* At the same time, however, the Court acknowledged that, because "neutrality" is a general principal, it "cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance." *Id.* at 2743; *see also Van Orden v. Perry*, 125 S.Ct. at 2868-69 (Breyer, J., concurring in the judgment) (observing that "[w]here the Establishment Clause is at issue, tests designed to measure 'neutrality' alone are insufficient"); *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (Souter, J., concurring) ("That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account."). In making this point, *McCreary* cited approvingly to Justice Harlan's observation

that "'neutrality' . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation" by the First Amendment. *McCreary County v. ACLU*, 125 S.Ct. at 2743 (quoting *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting)); *see also School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (cautioning that an "untutored devotion to . . . neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active hostility to the religious").

Thus, in reviewing Skoros's Establishment Clause claim, we do not test the City's challenged holiday display policy for absolute neutrality. Instead, we apply the three-prong analysis articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602. *Lemon* instructs that, consistent with the general neutrality objective of the Establishment Clause, government action that interacts with religion (1) "must have a secular . . . purpose," (2) must have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) "must not foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation marks omitted).[13]

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[13] The *Lemon* test has been much criticized over its twenty-five year history. *See, e.g, McCreary County v. ACLU*, 125 S.Ct. at 2757-58 (Scalia, J., dissenting) (criticizing heightened purpose test); *Van Orden v. Perry*, 125 S.Ct. at 2867 (Thomas, J., concurring) (faulting reliance on "unusually informed observer"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397-401 (1993) (Scalia, J, concurring in the judgment) (cataloguing cases in which justices have rejected *Lemon* test); *County of Allegheny v. ACLU*, 492 U.S. at 655 (Kennedy J., concurring in the judgment in part and dissenting in part) (criticizing endorsement test). Nevertheless, the Supreme Court has

In applying the *Lemon* test, we recognize that, in considering the "purpose" prong, we must follow *McCreary*'s recent instructions on the proper scope of purpose analysis. *See McCreary County v. ACLU*, 125 S.Ct. at 2734-37. Similarly, in reviewing the "effect" of the DOE policy, we heed Justice O'Connor's observation, first advanced in her concurring opinion in *Lynch v. Donnelly* and subsequently adopted by a majority of the Supreme Court in County of *Allegheny v. ACLU*, that *Lemon*'s second prong effectively asks whether "the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring) (emphasis

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never specifically disavowed *Lemon*'s analytic framework. *See, e.g., McCreary County v. ACLU*, 125 S.Ct. at 2733 (expanding on *Lemon*'s purpose prong in reviewing specific Ten Commandments display); *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (holding that *Lemon* analysis appropriately applies to facial challenges under the Establishment Clause); *cf. Van Orden v. Perry*, 125 S.Ct. at 2860-61 (acknowledging possible continued viability of *Lemon* test, but finding it "not useful" in reviewing constitutionality of the passive monument display in that case). This court has regularly relied on *Lemon* in evaluating Establishment Clause challenges and only recently reiterated that "the *Lemon* test continues to govern our analysis of Establishment Clause claims." *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 634 (2d Cir. 2005); *see Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425 (2d Cir. 2002) (applying *Lemon* test in assessing First Amendment challenge to New York's kosher fraud laws); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 75 (2d Cir. 2001) (applying *Lemon* test to Establishment Clause challenge to Earth Day celebration). We are, of course, required to respect this precedent until it is reconsidered by this court sitting *en banc* or is rejected by a later Supreme Court decision. *See Monsanto v. United States*, 348 F.3d 345, 351 (2d Cir. 2003). Accordingly, we apply *Lemon* analysis to Skoros's Establishment Clause challenge.

added); *see County of Allegheny v. ACLU*, 492 U.S. at 592-94 (opinion of Blackmun, J.); *see also Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 75 (2d Cir. 2001) (recognizing "endorsement" derives from second prong of *Lemon*).[14] Finally, in reviewing the challenged DOE policy for possible "excessive entanglement" with religion, we are careful to observe the link drawn in *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997), between this third prong of *Lemon* analysis and the second "effect" prong. *See Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425 (2d Cir. 2002).

2. Applying the *Lemon* Test in this Case

a. Purpose

When government action interacts with religion, *Lemon* instructs that the government purpose must be "secular." *Lemon v. Kurtzman*, 403 U.S. at 612. The requirement is not intended to favor the secular over the religious, but to prevent government from "abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987).

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[14] To the extent this court previously suggested in *dictum* that an as-applied Establishment Clause challenge might be resolved by reference only to "endorsement" in cases challenging government displays of religious imagery, *see generally DeStefano v. Emergency Hous. Group*, 247 F.3d 397, 411 (2d Cir. 2001), that possibility now seems foreclosed by *McCreary County v. ACLU*, which emphasized the importance of a "purpose" inquiry in evaluating a particular Ten Commandments display, 125 S.Ct. at 2733-37.

(1) The Policy's Actual Purpose Is Secular

(a) The Stated Purpose to Promote Pluralism

The purpose of the defendants' challenged policy is plainly stated in the DOE Holiday Display Memo issued to all public schools: holiday displays are to be used "to foster mutual understanding and respect for the many beliefs and customs stemming from our community's religious, racial, ethnic and cultural heritage." Holiday Display Memo at 1. The Memo instructs that "[t]he primary purpose of all [holiday] displays shall be to promote the goal of fostering understanding and respect for the rights of all individuals regarding their beliefs, values and customs." *Id.* As these statements demonstrate, the purpose of the policy is not simply "to celebrate the secular holiday season," as our dissenting colleague suggests. *Post* at **[8].** Rather, defendants are engaged in a specific pedagogical endeavor: to use children's natural excitement about various year-end holidays to teach the lesson of pluralism by showing children the rich cultural diversity of the city in which they live and by encouraging them to show tolerance and respect for traditions other than their own.[15]

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[15] We cannot agree with the dissent that the challenged policy, as stated or implemented, is "directed" at having schoolchildren "utilize[] religious symbols of certain religions," while "ban[ning] the religious symbols of another." *Post* at **[1]** (emphasis added). In fact, the policy strives to minimize the use of religious symbols to avoid Establishment Clause concerns. To the extent it approves the use of the menorah and the star and crescent in holiday displays, that decision appears to have been reached only after defendants determined that Chanukah and Ramadan could not reasonably be represented without these symbols and that such symbols could be

Not only is this stated purpose clearly secular; this particular secular purpose is one in which there is a strong public interest. When the Supreme Court, in *Board of Educ. v. Grumet*, 512 U.S. 687 (1994), ruled that the First Amendment did not permit New York State to create an independent school district for children of the Jewish Satmar sect, Justice Stevens, joined by Justices Blackmun and Ginsburg, observed that what the state could have done to alleviate the fears of Satmar children about attending a broader based public school was to teach students "to be tolerant and respectful of Satmar customs. Action of that kind would raise no constitutional concerns and would further the strong public interest in promoting diversity and understanding in the public schools." *Id.* at 711 (Stevens, J., concurring) (emphasis added). Chief Justice Rehnquist and Justices White, Scalia, and Thomas have acknowledged the same public interest, albeit in dissent in *Lee v. Weisman*: "maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate," 505 U.S. at 638 (Scalia, J., dissenting). Justice O'Connor, in her concurring opinion in *Allegheny*, has similarly identified "pluralism and freedom of belief" as secular purposes that properly can be promoted in a public holiday display without offending the Establishment Clause. *County of Allegheny v. ACLU*, 492 U.S. at 635-36 (O'Connor J., concurring in part and concurring in the judgment) (noting that display combining menorah, Christmas tree, and sign saluting liberty "is an

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incorporated into secular holiday displays celebrating pluralism. *See infra* at **[37-40 & n.18].** While federal courts must decide *de novo* the merits of defendants' incorporation conclusion, nothing in the record indicates that the policy is in any way "directed" at having schoolchildren utilize certain religious symbols *qua* religious symbols.

effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens"); *see also Walz v. Tax Comm'n*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring) (rejecting First Amendment challenge to tax exemptions for religious institutions because such organizations "contribute[] to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society").

In teaching the lesson of pluralism in New York City public schools, the defendants confront a greater challenge than the one at issue in *Kiryas Joel*, simply by virtue of the enormous size of the City school system and the extraordinary cultural diversity of its student body. Moreover, because a significant number of New York City schoolchildren or their parents are immigrants, sometimes from countries that place little value on either diversity or tolerance, City schools play a particularly important role in teaching these essential elements of pluralism to future generations of Americans. The fact that they do so, particularly at lower school levels, through cheerful multicultural holiday displays rather than formal textbook assignments, does not diminish the importance of the lesson, much less call into question its actual secular purpose.

In sum, because the promotion of tolerance and respect for diverse customs is the clearly stated purpose of the holiday display policy at issue in this case, we conclude that this purpose is permissibly secular.

(b) Skoros's Claim that the Policy's Stated Purpose Masks Defendants' Real Goal to Promote Judaism and Islam Over Christianity

At the first prong of *Lemon* analysis, we generally accord "deference" to such a clear government statement of an actual secular purpose provided that the reason is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary County v. ACLU*, 125 S.Ct. at 2735; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987). Skoros asserts that the defendants' stated purpose is not "genuine" because, if they were truly interested in encouraging respect for the diverse traditions of public school students, they would include the crèche in holiday displays and not represent Christmas only through secular symbols. Skoros submits that, by excluding the crèche as a religious symbol and by mischaracterizing the menorah and the star and crescent as secular symbols in order to permit their inclusion in school displays, defendants demonstrate that their actual purpose is not secular pluralism but the endorsement of Judaism and Islam. Like the district court, we reject this argument.

Preliminarily, however, we note that we cannot agree with the DOE Memo's characterization of the menorah as a secular symbol. In *Kaplan v. City of Burlington*, this court specifically identified the menorah as "a religious symbol of the Jewish faith . . . recognized as such by the general public." 891 F.2d at 1026. The Supreme Court and our sister circuits agree that the menorah is a religious symbol. *See County of Allegheny v. ACLU*, 492 U.S. at 613 (opinion of Blackmun, J.); *id.* at 633 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 643 (Brennan, J., concurring in part and dissenting in part); *ACLU v.*

Schundler, 168 F.3d at 108; *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 63 F.3d 581, 586 (7th Cir. 1995).[16] Nevertheless, we find no record evidence to support Skoros's contention that the DOE's characterization was an attempt to mask an impermissible purpose to promote Judaism and Islam or to denigrate Christianity. Rather, the record suggests that the DOE's characterization of the menorah as a secular symbol for purposes of inclusion in school holiday displays originated in a good-faith – if not entirely correct – reading of the Supreme Court's decision in *Allegheny*.

In his letter to Catholic League President Donohue, the Chancellor's general counsel stated:

> The *Allegheny* court recognized that while the Menorah has both religious and secular dimensions, it has become the primary visual symbol for the holiday of Hanukkah. Further, the Court acknowledged that there is no more secular alternative symbol to represent Hanukkah. Neither of these factors hold true for the crèche. The crèche is solely a religious symbol

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[16] For purposes of this appeal, we assume that the star and crescent is also a religious rather than a secular symbol, although arguments apparently can be raised to the contrary. *See Mehdi v. United States Postal Servs.*, 988 F. Supp. 721, 723 (S.D.N.Y. 1997) (suing unsuccessfully to display the star and crescent, a "secular symbol of the Muslim people," in United States post offices when Christmas trees and menorahs are used in holiday displays); *see also* 8 *Encyclopedia Americana*, "Crescent," 175 (int'l ed. 2002) (noting original secular significance of crescent symbol); 7 *Encyclopedia of Religion*, "Islamic Iconography," 66 (Mircea Eliade ed., 1987) (explaining that crescent's early appearance on Islamic coins and metalwork had no religious connotations).

> and there clearly are other secular alternative symbols of the Christmas holiday.

Vignola Letter to Donohue, Oct. 28, 2002, at 1.

As we noted earlier, six justices agreed in *Allegheny* that a menorah displayed together with a Christmas tree and a sign saluting liberty did not violate the Establishment Clause, but no one opinion commanded a majority of the Court on this point. Four justices observed that Chanukah, like Christmas, was a religious holiday that had acquired secular significance. *See County of Allegheny v. ACLU*, 492 U.S. at 585 & n.29 (plurality opinion) (Blackmun, J.); *id.* at 633 (O'Connor, J., concurring in part and concurring in the judgment). It was Justice Blackmun who, in a footnote, stated that "menorahs – like Chanukah itself – have a secular as well as a religious dimension." *Id.* at 587 n.34 (plurality opinion) (Blackmun, J.). On this point, however, he did not speak for the Court.[17] Indeed, although Justices O'Connor and Stevens joined in this part of Justice Blackmun's opinion, they subsequently joined a majority of their colleagues in faulting Justice Blackmun for attempting to "relegate[] the menorah to the role of a neutral harbinger of the holiday season." *Id.* at 633 (O'Connor, J., concurring in part and concurring in the judgment) (internal

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[17] Justice Blackmun's *Allegheny* opinion, 492 U.S. at 578, demands careful reading because parts III-A, IV, and V (holding that courthouse crèche display violated Establishment Clause) do represent a clear holding of the Court. As for the remainder of his opinion, parts I (containing the cited excerpt) and II were joined by Justices Stevens and O'Connor; part III-B was joined by Justice Stevens; and part VII was joined by Justice O'Connor. In Part VI of the opinion, in which Justice Blackmun concluded that the menorah/Christmas tree display did not violate the Establishment Clause, Justice Blackmun spoke only for himself.

quotation marks omitted); *accord id.* at 643-44 (Brennan, J., concurring in part and dissenting in part); *id.* at 676-78 (Kennedy, J., concurring in the judgment in part and dissenting in part).

To the extent the DOE may mistakenly have understood the Court as a whole to recognize a "secular dimension" for the menorah, we are not persuaded that this error exposes defendants' true purpose to be the promotion of Judaism or Islam in the City's public schools. Rather, we conclude that the interpretive error is attributable simply to the complexity of the opinions in *Allegheny* and to the DOE's failure carefully to distinguish between those parts of Justice Blackmun's opinion that spoke for a majority of the Court and those that did not.

In any event, the significance of any DOE error must not be overstated in evaluating the true purpose of its challenged policy. The DOE's characterization of discrete holiday symbols as secular or religious is not an end in itself but only a means to assist school administrators and teachers in identifying holiday symbols that could permissibly be used to convey the policy's approved secular message of pluralism. The fact that the menorah and perhaps the star and crescent might appropriately be characterized as religious rather than secular symbols does not necessarily indicate that the defendants pursue an unconstitutional purpose.[18] Indeed, last

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[18] The DOE's characterization of the star and crescent as a permissible secular symbol for school holiday displays apparently resulted from its settlement of a lawsuit filed by the same plaintiff as in *Mehdi v. United States Postal Service*, 988 F. Supp. 721. *See supra* at n.16. In an affidavit to the district court in this case, the Chancellor's general counsel explained that, in connection with that earlier suit, the City's Corporation Counsel "consulted with several

term, the Supreme Court specifically declined to hold "that a sacred text [or symbol] can never be integrated constitutionally into a governmental display" to serve a secular purpose. *McCreary County v. ACLU*, 125 S.Ct. at 2741. The critical inquiry, as the Court had earlier made plain in the very context of a public school, is whether the religious text or symbol has been sufficiently "integrat[ed] . . . into a secular scheme to forestall the broadcast of an otherwise clearly religious message." *Id.* at 2737-38 (citing *Stone v. Graham*, 449 U.S. 39, 42 (1980) (*per curiam*) (declaring unconstitutional isolated exhibition of Ten Commandments in school classrooms)); *accord Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d at 76.

Allegheny undoubtedly holds that a menorah – although a religious symbol – can constitutionally be integrated into a public holiday display that has a secular rather than religious purpose and effect. This ruling has itself likely contributed to increased inclusion of menorahs in secular holiday displays over the last fifteen years. *See, e.g., Mehdi v. United States Postal Servs.*, 988 F. Supp. 721, 729 (S.D.N.Y. 1997) (Sotomayor, J.) (noting that Postal Service policy of displaying decorated evergreen trees and menorahs with other

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experts who indicated that the star and crescent, which appears on the flags of some countries that have large Muslim populations but have secular governments, has a secular dimension, . . . was not originally derived from the Quran and is also considered a political or cultural symbol." Vignola Aff. at 7, ¶ 22. Accordingly, the Board settled the lawsuit by agreeing "that schools would be permitted, but not required, to display the star and crescent with other permitted symbols." *Id.* These circumstances would not indicate to an objective observer that defendant's real purpose in allowing the display of the star and crescent is to promote the Islamic religion or to inhibit the practice of Christianity.

seasonal symbols "was no doubt crafted . . . with *Allegheny* in mind"). Indeed, we can find proof of this trend in the lobby of our own Foley Square courthouse, which is decorated in December with a Christmas tree, numerous poinsettia plants, and a menorah.

The DOE policy does not permit the menorah or the star and crescent ever to be used in school holiday displays in isolation, thereby avoiding the problem prompting this court to invalidate a menorah display in *Kaplan v. City of Burlington*, 891 F.2d at 1030. Indeed, the policy expressly states that "any symbol or decoration which may be used" in a school holiday display "must be displayed simultaneously with other symbols or decorations reflecting different beliefs or customs." Holiday Display Memo at 1 (emphasis added). In light of this requirement, we reject Skoros's claim that the defendants' stated secular purpose is a sham for actual religious endorsement. We conclude that the actual purpose of the challenged policy is as stated by the defendants: to promote pluralism through multicultural holiday displays.

(2) An Objective Observer Would Perceive the Policy's Purpose to Be Secular

Although the purpose prong of *Lemon* had long been understood to require courts to inquire only as to "actual purpose," *see, e.g., Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring), the Supreme Court has recently instructed that the inquiry must further extend to how the government's purpose is perceived by "an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute," *McCreary County v. ACLU*, 125 S.Ct. at 2734 (internal quotation marks omitted).

(a) Identifying the "Objective Observer"

It might appear implicit in *McCreary*'s quoted definition that the objective observer is an adult. In *Santa Fe Independent School District v. Doe*, however, the Supreme Court cast a high school student in this role. *See* 530 U.S. at 308 (noting that "an objective Santa Fe High School student" would perceive pre-game prayer as stamped with school's approval); *see also Board of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 249-52 (1990) (same). We cannot conclude that it makes equal sense to treat a first or second grader as the "objective observer" who can take account of the text, history, and implementation of a challenged policy. *Cf. Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001) ("[T]o the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, the relevant community would be the parents, not the elementary school children.") (internal citation omitted). In this case, the children who are the intended audience for the challenged displays vary widely in age, from kindergarten students just learning to read to high school seniors eligible to vote. In these circumstances, we do not assume that the "objective observer" whose perception of purpose is relevant to our analysis is a student because not all such students are sufficiently mature to take full account of the text, history, and implementation of the challenged display policy.[19] Instead, we assume the objective observer is an adult who, in taking full account of the policy's text, history, and implementation, does so mindful that the displays at issue will

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[19] We note that the trial evidence in this case focuses on the application of the challenged holiday display policy in elementary schools. There is no evidence as to the application of the policy in high schools.

be viewed primarily by impressionable schoolchildren. *See Edwards v. Aguillard*, 482 U.S. at 583-84 (noting schoolchildren's impressionability); *Lee v. Weisman*, 505 U.S. at 597 (same).

Our dissenting colleague disagrees with this identification of the objective observer, a disagreement that carries over into the second prong of Lemon analysis, where the "effect" of the challenged government action has long been tested by reference to a reasonable observer. *See Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d at 75 (collecting cases).[20] He concludes that a court must view the displays from the perspective of (1) "elementary or secondary school students in the New York City public school system," and (2) "parents of such students who experience the displays through and with their children and who have knowledge of the history and context of the policy and displays." *Post* at **[1]**. He notes that "we must not lose focus on who is actually the recipient of the message conveyed and how that message will affect such a recipient." *Post* at **[11]**. We agree that the intended recipient of a display message is a factor – undoubtedly an important factor – to be considered by the reasonable objective observer whose perceptions determine whether the government acts with a purpose and effect that violates the Establishment

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[20] There appears to be no difference in the Supreme Court's characterization of an "objective observer" and a "reasonable observer" at the first two stages of *Lemon* analysis. *Compare McCreary County v. ACLU*, 125 S.Ct. at 2734 *with Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in the judgment). Thus, in this opinion we use the terms interchangeably and our reasoning in identifying the objective observer relevant to purpose analysis applies equally to identifying the observer relevant to effect analysis.

Clause, but we do not think the intended recipient of a display necessarily defines the objective observer.

In reaching this conclusion, we recognize that the reasonable objective observer standard, like other aspects of the *Lemon* test, is subject to criticism. Most recently, Justice Thomas faulted the standard for ignoring the fact that persons of faith or of no faith may have stronger concerns about particular government action than the model "reasonable observer." *See Van Orden v. Perry*, 125 S.Ct. at 2867 (Thomas, J., concurring). Whatever the merits of this criticism, until the Supreme Court rules otherwise, we are not free to discard or recast the reasonable objective observer test in assessing the secular purpose and effect of challenged government action. The Court has made plain that a reasonable objective observer must take full account of "the text, legislative history and implementation of the statute." *McCreary County v. ACLU*, 125 S.Ct. at 2734 (internal quotation marks omitted). Indeed, Justice O'Connor insisted on this characterization in a case arising in the context of a public elementary school. *See Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 34 (2004) (O'Connor, J., concurring in the judgment). In rejecting an Establishment Clause challenge by the father of a kindergarten child to a school policy providing for the voluntary recital of the Pledge of Allegiance, Justice O'Connor described the relevant reasonable objective observer as a person "fully cognizant of the history, ubiquity, and context of the practice in question." *Id.* at 40. She concluded that "[s]uch an observer could not conclude that reciting the Pledge, including the phrase 'under God,' constitutes an instance of worship." *Id.* (emphasis added). Thus, because, as even the dissent appears to recognize, *see post* at **[15]**, young schoolchildren cannot satisfy the requirements of an objective observer recently specified by the Supreme Court in *McCreary*, we conclude

that such children cannot provide the model of the objective observer for purposes of *Lemon* analysis in this case.

Nor does Supreme Court precedent appear to contemplate multiple reasonable objective observers, for example, persons who believe in God as distinct from those who do not; child observers as distinct from adult observers; or, as the dissent suggests, children who practice Judaism or Islam as distinct from other children. *See post* at **[22, 36]** (concluding that Jewish and Muslim students would think the challenged displays endorsed Judaism and Islam). As Justice O'Connor has explained, the reasonable observer standard does not "focus on the actual perception of individual observers, who naturally have differing degrees of knowledge." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in the judgment). Instead, the standard strives to identify "a personification of a community ideal of reasonable behavior determined by the collective social judgment." *Id.* at 780 (alteration and internal quotation marks omitted).

Mindful of this goal, we do not attempt to cast schoolchildren of widely varying ages and religious backgrounds in the role of one or more reasonable objective observers. At the same time, however, we do not turn a "blind eye" to the fact that schoolchildren are the intended audience for the challenged displays, as the dissent suggests. *See post* at **[1]**. We reiterate that we expect that a mature reasonable objective observer, in noting the "context of the community and forum" in which the challenged holiday displays appear, would take into consideration that schoolchildren are the intended audience for the displays, that these children are being reared in a variety of faiths (as well as none), and that, by virtue of their ages, they may be

especially susceptible to any religious messages conveyed by such displays.[21]

With this understanding of the objective-observer standard, we consider how two facts could affect such an observer's perception of the defendants' asserted secular purpose: (1) defendants' allowance of the menorah and the star and crescent in school holiday displays, and (2) their disallowance of the crèche.

(b) Defendants' Integration of the Menorah and the Star and Crescent in School Holiday Displays Communicates a Secular Purpose

As already noted, defendants do not permit the menorah, the star and crescent, or any holiday symbol to be used in isolation in school holiday displays. *See* Holiday Display Memo at 1 ("[A]ny symbol or decoration which may be used must be displayed simultaneously with other symbols or decorations reflecting different beliefs or customs). The record evidence of holiday displays in P.S. 165, P.S. 169, and P.S. 184, detailed in our earlier discussion of the facts,

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[21] In the context of discrimination cases, where there is some tension in our case law as to whether a "reasonable person" standard references a member of the protected class or the public at large, *see Petrosino v. Bell Atlantic*, 385 F.3d 210, 221-22 (2d Cir. 2004) (comparing cases), Judge Newman has suggested that a reasonable person should be someone informed of "how members of the protected class regard the challenged remarks or displays," *Brennan v. Metropolitan Opera Ass'n, Inc.*, 192 F.3d 310, 321 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part). The same expectation is reasonably applied to reasonable observer analysis in the context of Establishment Clause challenges.

see supra at **[10-15]**, amply demonstrates that these instructions are, in fact, implemented by City schools in creating multicultural holiday displays. Thus, when menorahs or stars and crescents are displayed, their religious significance is appropriately neutralized by myriad accompanying symbols of other winter holidays having nonreligious as well as religious origins.[22] As a result, no objective observer of the displays in evidence would understand the defendants' purpose to be other than that stated in the Holiday Display Memo, that is, to promote schoolchildren's understanding and respect for the many cultural traditions celebrated in New York City during the winter holiday season. Certainly, no objective observer would understand the purpose of the displays to be the endorsement or promotion of Judaism or Islam or the denigration of Christianity, as alleged by the plaintiff. *See County of Allegheny v. ACLU*, 492 U.S. at 635-36 (O'Connor, J., concurring in part and concurring in the judgment); *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. at 711 (Stevens, J., concurring) (observing that "no constitutional concerns" arise from school efforts to teach children about minority religious customs in order to promote respect and tolerance); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (distinguishing between permissibly educating students as to meaning of flag salute and impermissibly compelling them to "declare a belief" by performing the salute).

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[22] For this reason, we cannot agree with the dissent that the menorah or star and crescent displays at issue in this case present an endorsement concern akin to that identified in *Fox v. Los Angeles*, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978), a case in which an illuminated Latin cross was displayed in isolation on the face of the Los Angeles city hall at Easter time. *See post* at **[21-22]**.

Our dissenting colleague nevertheless concludes otherwise. He submits that, because a Jewish or Muslim child knows the religious significance of a menorah or star and crescent, such a child would perceive the defendants' real intent to be to endorse Judaism and Islam over Christianity. *See post* at **[22, 36].** We cannot agree with this conclusion, which finds no support in the record. Certainly, no trial evidence was adduced in this case showing the effect of the challenged holiday displays on any child, much less an effect on Jewish and Muslim children leading them to think that school officials favored their religions over Christianity. *Cf. McCreary v. Stone*, 739 F.2d 716, 727 (2d Cir. 1984) (declining to speculate that crèche display affected children differently from adults in the absence of record evidence), *aff'd by an equally divided court sub nom., Board of Trustees of Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985) (*per curiam*).

The dissent submits that no evidence is necessary on this point because the question "'whether a government activity communicates endorsement of religion is . . . in large part a legal question to be answered on the basis of judicial interpretation of social facts.'" *Post* at **[32-33]** (quoting *Lynch v. Donnelly*, 465 U.S. at 693-94 (O'Connor, J., concurring)). In any event, it submits that no evidence supports our conclusion that an objective adult observer would perceive the purpose and effect of the challenged displays as secular. We disagree.

First, we note that the conclusion we reach today is supported by both law and evidence, specifically, (1) by *Allegheny*'s recognition that a menorah displayed with secular holiday symbols can reasonably be understood to convey to an objective observer "a message of pluralism and freedom of belief during the holiday season," not a message to Jews (or

Muslims) that their religion is officially endorsed, 492 U.S. at 635-36 (O'Connor, J., concurring in part and concurring in the judgment); and (2) by record evidence that the challenged holiday display policy, as stated and implemented, comports with *Allegheny* by prohibiting the celebration of any single holiday in school displays and by requiring any holiday symbol to be displayed in conjunction with "other symbols or decorations reflecting different beliefs or customs." Holiday Display Memo at 1. Indeed, we have discussed the actual displays in such detail, *see supra* at **[10-15]**, precisely because we think it apparent that they pass constitutional muster under *Allegheny*.

Second, Justice O'Connor's cited observation in *Lynch* implies that no specific evidence is necessary to allow judges to determine how a mature objective mind would process the images and information conveyed by a holiday display. *See Lynch v. Donnelly*, 465 U.S. at 693-94 (O'Connor, J., concurring); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. at 40 (O'Connor, J., concurring in the judgment) (reviewing Establishment Clause challenge in school context by reference to mature objective observer, not schoolchild). But when the issue is whether an immature mind would process the same information differently, some evidence on that point may well be necessary to permit a judge to conclude, as the dissent does here, that displays that would communicate pluralism to an objective adult would communicate religious endorsement to a Jewish or Muslim child.

Further, the conclusion urged by the dissent as to the impact the challenged displays would have on Jewish and Muslim children is by no means the obvious "judicial interpretation of [the] social facts" here at issue. *See Lynch v. Donnelly*, 465 U.S. at 693-94 (O'Connor, J., concurring). It

requires a court to assume not only that young Jewish and Muslim children recognize the religious significance of their own Chanukah and Ramadan symbols, but also that these children are sufficiently sophisticated in Christian iconography to understand that the myriad Christmas symbols included in school holiday displays lack religious significance. Absent some supporting evidence, however, it makes equal sense to conclude that young Jewish and Muslim children understand Christmas symbols simply as signs of a holiday celebrated primarily by the nation's Christian majority. In that context, a young Jewish child seeing a menorah or a Muslim child seeing a star and crescent included in the multicultural holiday displays in evidence in this case, would simply conclude that his beliefs and traditions are as respected as those of any other group, not that they are favored or officially endorsed. Thus, on the trial record developed in this case, we have no reason to conclude that the Supreme Court's decision in *Allegheny* about the pluralistic message conveyed by the inclusion of a menorah (or a star and crescent) in a multicultural holiday display applies with any lesser force when such a display appears in a public school rather than a public park.

(c) Defendants' Decision to Represent Christmas in School Holiday Displays Through Secular Symbols Does Not Demonstrate a Purpose Hostile to Christianity

No different conclusion is warranted by the defendants' decision not to permit a crèche or nativity scene to represent Christmas in school holiday displays. Indeed, Justice O'Connor's concurring opinion in *Allegheny* concluded that the government's decision to use secular symbols to represent Christmas in a multicultural holiday display that used a

menorah to represent Chanukah confirmed that the real purpose of the display was to communicate pluralism rather than to endorse religion, whether Judaism or Christianity. *See County of Allegheny v. ACLU*, 492 U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment); *see also Elewski v. City of Syracuse*, 123 F.3d at 58 (Cabranes, J., dissenting) (noting that "secular context and a message of pluralism" was what "enabled the menorah/Christmas tree display in *Allegheny* to survive constitutional scrutiny").

As we noted at the outset of this opinion, we do not here decide whether there are any circumstances in which the defendants could constitutionally include a crèche in a public school holiday display. Nor do we ignore the possibility that, in some circumstances, a government's deliberate exclusion of the religious symbol of one faith from a display that includes the religious symbols of other faiths could communicate the official favoritism or hostility among religious sects that is prohibited by the Establishment Clause. *See generally School Dist. v. Schempp*, 374 U.S. 203 at 305 (Goldberg, J., concurring) (noting that government must "effect no favoritism among sects"); *accord Van Orden v. Perry*, 125 S.Ct. at 2868 (Breyer, J., concurring in the judgment). We hold only that where, as in this case, defendants permissibly include a religious symbol in a holiday display that unquestionably serves the secular purpose of pluralism, the Establishment Clause does not necessarily demand that they employ a religious symbol for every holiday that has a religious as well as a secular component.

This court has recognized that when "government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the

Establishment Clause." *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 476 (2d Cir. 1999); *see Walz v. Tax Comm'n*, 397 U.S. at 669 (observing that, short of "governmentally established religion or governmental interference with religion," the First Amendment allows some "room for play in the joints productive of a benevolent neutrality"); *see also Locke v. Davey*, 540 U.S. 712, 718 (2004) (reiterating Walz's recognition of "room for play in the joints"). In this case, the Chancellor's general counsel, in an affidavit submitted to the district court, explained that, to ensure compliance with the Establishment Clause, the DOE's holiday display policy seeks to avoid the use of any holiday symbols that depict deities. *See* Vignola Aff. at 5, ¶ 16. A nativity scene undoubtedly qualifies as the depiction of a deity, with the infant Jesus usually being worshiped as God-made-man by adoring angels, shepherds, and wise men. While a menorah is understood to commemorate a miracle performed by God, it does not itself depict a deity. Nor does the star and crescent. This is not to suggest that the menorah (or the star and crescent) is a less religious symbol than the crèche. *See Allegheny County v. ACLU*, 492 U.S. at 633-34 (O'Connor, J. concurring in part and concurring in the judgment) (recognizing menorah as "the central religious symbol and ritual object" of Chanukah, which, like the crèche, could convey a message of endorsement when standing alone).[23] It simply recognizes that the crèche conveys its religious message more

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[23] We need not – and therefore do not – attempt to determine the relative religious significance of the menorah, the star and crescent, or the crèche to Judaism, Islam, and Christianity. To the extent the dissent ascribes any such conclusion to the court, *see post* at **[18-19]**, it is mistaken. Our concern is not the religious significance of these symbols to particular faiths, but the symbols' perceived endorsement of religion, generally or specifically, in the context of the challenged school holiday display policy.

representationally and less symbolically than the menorah and the star and crescent. For this reason, the religious significance of a crèche may be more obvious to the average schoolchild than that of the menorah and the star and crescent. Thus, whether or not the defendants' exclusion of the crèche is constitutionally mandated, an objective observer would recognize that the distinction drawn by the Chancellor's counsel reflects a sincere "effort to avoid transgressing Establishment Clause limits," *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d at 476, and not a religious purpose to endorse Judaism or Islam.

Indeed, that conclusion is reinforced by the fact that the Christian holiday of Christmas is well represented in the City's school holiday displays through a variety of well recognized and beloved symbols, including the Christmas tree, Santa Claus, reindeer, candy canes, gingerbread boys and girls, tinsel garlands, strings of lights, not to mention Christmas wreaths, candles, stars, and presents.[24] To the extent these Christmas symbols shared classroom, lobby, and hall space with snowmen, snowflakes, menorahs, dreidels, kinaras, and, on one occasion, a star and crescent, no

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[24] Some of these Christmas holiday symbols have or have had religious connotations. For example, the Christmas star that tops many Christmas trees recalls the star of Bethlehem that announced Christ's birth to the Magi. *See* Matthew 2:2. Christmas presents evoke the gifts of gold, frankincense, and myrrh given to Christ by the Magi. *See* Matthew 2:11. Christmas candles represent Christ as a light coming into a world of darkness. *See* John 1:5. As for Santa Claus, he was Saint Nicholas before Thomas Nast and Clement Moore replaced his bishop's miter and crozier with a sack full of toys and a team of reindeer. All these items are now widely accepted as secular symbols of a holiday that is celebrated even by people of no faith.

objective observer would understand defendants' purpose to be to denigrate Christianity. Indeed, that argument is conclusively refuted by the instructional cards used by the defendants in some elementary school classrooms. *See supra* at **[14-15].** As our earlier quotation of the text of these cards demonstrates, they afford equally respectful treatment to the religious origins of Christmas, Chanukah, and Ramadan, as well as the secular origins of Kwanzaa. The Christmas card even alludes to the Christian tradition of erecting nativity scenes.

In sum, even if the DOE erred in characterizing the menorah and the star and crescent as "secular" symbols, and whether or not the DOE is correct in its assessment that the crèche would be more difficult than the menorah or the star and crescent to incorporate into a secular holiday display in New York City public schools, no reasonable objective observer would perceive from the totality of the circumstances in this case that the purpose of the challenged display policy was, in fact, to communicate to City schoolchildren any official endorsement of Judaism and Islam or any dismissal of Christianity. Accordingly, we conclude, as did the district court, that the defendants satisfy the first prong of the *Lemon* test because the actual and perceived purpose of the DOE holiday display policy is secular: to use holiday celebrations to encourage respect for the City's diverse cultural traditions.

In the next section of this opinion, we consider whether, despite this secular purpose, the DOE holiday display policy nevertheless has the impermissible effect of endorsing Judaism or Islam or inhibiting the practice of Christianity.

b. Primary Effect

The second prong of the *Lemon* test mandates that the "principal or primary effect" of the challenged government action "must neither advance nor inhibit religion." *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d at 430. When applied to holiday display challenges, this analysis is "highly fact-specific," asking: "Would a reasonable observer of the display in its particular context perceive a message of governmental endorsement or sponsorship of religion?" *Elewski v. City of Syracuse*, 123 F.3d at 53 (emphasis added); *accord Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d at 75.

(1) The Endorsement Test

As Justice O'Connor, the principal architect of the "endorsement test," explained in *Allegheny*, the concept of endorsement is not limited to government coercion or efforts at proselytization; it is intended to take account of "the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others." 492 U.S. at 627-28 (O'Connor, J., concurring in part and concurring in the judgment).[25] The endorsement test does not require courts to "sweep away all

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[25] In *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, members of the Court divided on the question whether endorsement analysis was properly applied only to government speech, *compare id.* at 763-70 (plurality opinion) (Scalia, J.) (concluding that endorsement test should be limited to government speech or discrimination) *with id.* at 786-92 (Souter, J., concurring in part and concurring in the judgment) (rejecting plurality's view of scope of endorsement test). We need not address this issue because the parties do not contest that the challenged actions here at issue represent government speech.

government recognition and acknowledgment of the role of religion in the lives of our citizens." *Id.* at 623; *see id.* at 631 ("[G]overnment can acknowledge the role of religion in our society in numerous ways that do not amount to an endorsement." (emphasis in original)). Rather, it seeks to ensure that government does "not make a person's religious beliefs relevant to his or her standing in the political community," *id.* at 627, thereby sending "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community," *Lynch v. Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring).

Like the "objective observer" whose perception of purpose is at issue at the first step of *Lemon* analysis, the "reasonable observer" employed in the endorsement test, *see Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d at 75 (collecting cases), is not a particular individual, but "'a personification of a community ideal of reasonable behavior,'" *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment) (quoting W. Keeton, et al., *Prosser and Keeton on Law of Torts* 175 (5th ed. 1984)). A court reviewing an Establishment Clause challenge to a particular holiday display is not required to ask "whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think [the State] endorses religion.'" *Id.* (quoting *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992) (*en banc*) (emphasis in original)). Rather, it considers whether a "reasonable observer . . . aware of the history and context of the community and forum in which the religious display appears," would understand it to endorse religion or, in this

case, one religion over another. *Id.*; *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. at 40 (O'Connor, J., concurring in the judgment).

(2) Applying Endorsement Analysis to Public Schools

When, as in this case, we apply endorsement analysis to a policy that operates throughout a city's public elementary and secondary schools, special concerns arise in the identification of a reasonable observer. As we noted in discussing a similar ideal observer whose perception of purpose was relevant at step one of the *Lemon* analysis, it makes no sense at the effect step to view a kindergarten child or first grader as someone "fully cognizant of the history, ubiquity, and context of the practice in question," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. at 40 (O'Connor, J., concurring in the judgment), even if certain high school students may fit this description, *see Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. at 308. Because of the range of the students to whom the challenged display policy applies, we conclude that the relevant objective observer, whether with respect to purpose or effect, is an adult who is "aware of the history and context of the community and forum in which the religious display appears," *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment), and who understands that the display of a religious symbol in a school context may raise particular endorsement concerns, because of the pressure exerted on children by the "law of imitation," *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. at 227 (Frankfurter, J.,

concurring) (observing that "nonconformity is not an outstanding characteristic of children").[26]

The latter concerns do not mean that the Constitution prohibits public schools from making any mention of religion when teaching a secular lesson about pluralism and tolerance. *See Stone v. Graham*, 449 U.S. at 42 (recognizing that Bible may be used "in an appropriate study of civilization, ethics, comparative religion, or the like"); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. at 225 (recognizing Bible as "worthy of study for its literary and historic qualities . . . as part of a secular program of education"); *accord Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d at 76. As Justice Jackson observed, if that were the rule, "public education [would be left] in shreds."

> Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a

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[26] In a number of cases, the Supreme Court has noted that Establishment Clause analysis can yield different results depending on whether challenged conduct occurs within a public school or in some other setting. *Compare Stone v. Graham*, 449 U.S. at 42-43 (holding unconstitutional state law requiring Ten Commandments to be posted in every public school classroom) *with Van Orden v. Perry*, 125 S.Ct. at 2864 (rejecting constitutional challenge to Ten Commandments display on state capitol grounds); *compare also Lee v. Weisman*, 505 U.S. at 598-99 (holding prayer at secondary school graduation to be unconstitutional) *with Marsh v. Chambers*, 463 U.S. 783, 793-95 (1983) (upholding prayer in state legislature). *See also County of Allegheny v. ACLU*, 492 U.S. at 620 n.69 (opinion of Blackmun, J.) (noting that combined Christmas tree and menorah display "might raise additional constitutional considerations" if display were "located in a public school").

> secular point of view. . . . Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity – both Catholic and Protestant – and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. at 235-36 (Jackson, J., concurring); *see also Edwards v. Aguillard*, 482 U.S. at 607, 608 n.8 (Powell, J., concurring) (noting that "since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events," citing "political controversies in Northern Ireland, the Middle East and India" as examples of world events that "cannot be understood properly without reference to the underlying religious beliefs and the conflicts they tend to generate"). Where the Supreme Court has demanded vigilance is in ensuring that public schools do not appear to endorse religious creed and do not employ religious rituals and ceremonies in school activities. *See, e.g., School Dist. of Abington Twp. v. Schempp*, 374 U.S. at 226-27 (declaring daily prayer in public school unconstitutional); *see also Lee v. Weisman*, 505 U.S. at 598-

99; *Stone v. Graham*, 449 U.S. at 42-43; *Lemon v. Kurtzman*, 403 U.S. at 619.

(3) The DOE Holiday Display Policy Does Not Endorse or Inhibit Religion

In applying these principles to this case, it is important to note that the challenge at issue does not concern a single public display, as in most cases that have come before the courts. *See, e.g., McCreary County v. ACLU*, 125 S.Ct. 2722; *County of Allegheny v. ACLU*, 492 U.S. 573; *Elewski v. City of Syracuse*, 123 F.3d 51. Rather, its focus is a policy intended to ensure that thousands of holiday displays created annually for New York City's public school classrooms, hallways, and lobbies comport with the First Amendment's religion clauses. The displays are obviously all on public property and are publicly funded. Further, the schoolchildren for whose benefit these displays are created have no option but to view them and, sometimes, to participate in the craft projects that are integral to many of the displays.[27] Having

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[27] Because Skoros did not ask to have her children excused from any project or assignment relating to a holiday originating in a religious tradition other than her own, we have no occasion to consider whether a school would have to honor such a request when the purpose of the project -- to teach cultural diversity -- comported with the First Amendment. *Cf. West Virginia Bd. of Educ. v. Barnette*, 319 U.S. at 631 (distinguishing between school permissibly making students "acquainted with the flag salute so that they may be informed as to what it is or even what it means" and unconstitutionally compelling students "to declare a belief" by performing the salute); *Leebaert v. Harrington*, 332 F.3d 134, 140-42 (2d Cir. 2003) (rejecting claim of parental right to have son excused from school health course that conflicted with parent's religious beliefs regarding morality: parental right to decide not to

carefully reviewed the record, we nevertheless conclude, as the district court did, that a reasonable observer would not understand the challenged holiday display policy, either on its face or as applied, to endorse Judaism or Islam or to communicate to children who practice either of those faiths that they are favored members of their school and civic communities, while communicating to Christian children or others that they are somehow inferior.

As previously noted in our discussion of purpose, the challenged DOE policy specifically states that no school display may appear to promote any single religion or holiday. The record evidence demonstrates that this directive is carefully observed in the City schools. The photographic exhibits confirm the district court's finding that defendants' 2001-2002 holiday displays afforded City schoolchildren a "dizzying array" of seasonal symbols, *Skoros v. City of New York*, 2004 U.S. Dist. LEXIS 2234, at *42, allowing each student to find some familiar symbol (whether a Christmas tree, a menorah, a kinara, a star and crescent, or simply a cheerful snowman or lacy snowflake) with which to identify, while at the same time exposing the child to less familiar symbols from which he could learn about cultures and

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send child to public school did not encompass a right to dictate the curriculum at the public school to which the parent did send the child). Plainly, defendants could not devise a holiday project that required a child to participate in a religious ritual. *See, e.g., Lee v. Weisman*, 505 U.S. at 598-99 (holding that requiring students to stand for graduation prayer constituted compelled participation in religious ritual); *accord Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. at 312; *cf. Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d at 80 (rejecting constitutional challenge to Earth Day program in which students were not required to participate). That concern, however, is not present in this case.

traditions different from his own. Of the various holiday symbols depicted in the display photos, the menorah (and perhaps the star and crescent) might appear to a reasonable adult observer to have the most religious significance. But such an objective observer would readily perceive from the instructional cards used in certain classrooms that the defendants treated the religious and secular origins of all winter holidays celebrated in school displays with equal respect. More important, the observer would see that the menorah and the star and crescent, when used in holiday displays, always shared space with a multitude of secular symbols so that even the youngest elementary schoolchild would understand that the message being conveyed was not the endorsement of Judaism or Islam but a recognition of the diversity of winter holiday celebrations among different cultures. *See Van Orden v. Perry*, 125 S.Ct. at 2869 (Breyer, J., concurring in the judgment) (emphasizing that, whether a religious text or symbol conveys a religious or secular message requires court to "examine how the text [or symbol] is used" in the context of the display) (emphasis in original); *County of Allegheny v. ACLU*, 492 U.S. at 635 (O'Connor, J., concurring in part and concurring in the judgment) (concluding that menorah displayed with Christmas tree and sign saluting liberty "did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season"); *Elewski v. City of Syracuse*, 123 F.3d at 55 (holding that reasonable observer would perceive crèche in context of overall holiday decorations not as an endorsement of Christianity but as a "celebration of the diversity of the holiday season"). In short, an objective observer would conclude that the effect of displaying the menorah and star and crescent, together with Christmas trees, Christmas wreaths, candles, stars, kinaras, snowmen and a host of other holiday symbols in integrated holiday displays was simply to familiarize schoolchildren with

the fact that all these symbols are used by certain members of the community to celebrate holidays at the end of the calendar year, that the various traditions reflected in these holidays are entitled to everyone's respect, and that the diversity of these traditions enriches the community for all members. Nothing in the record would indicate to an objective observer that the effect of displaying the menorah and the star and crescent would be "to induce the schoolchildren . . . to venerate" these objects or to accept the religious creeds of Judaism and Islam as officially endorsed by the state. *Stone v. Graham*, 449 U.S. at 42.

To the extent our dissenting colleague concludes that Jewish and Muslim children would understand the holiday displays to favor their religions over Christianity, we reject that conclusion for reasons already noted in our discussion of purpose, *see supra* at **[44-45]**; specifically, it has no support in the record and, therefore, is at odds with *County of Allegheny v. ACLU*, 492 U.S. at 635 (O'Connor, J., concurring in part and concurring in the judgment). We simply cannot agree that a Jewish or Muslim child who saw menorahs and stars and crescents included in December holiday displays that invariably also showed Christmas trees, Christmas stars, Christmas candles, Christmas stockings, Christmas lights, and Christmas wreaths, would be apt to conclude that school officials favored his religion over Christianity.

We expect that the real Establishment Clause challenge for the defendants in developing the holiday display policy at issue was not that Jews and Muslims would infer from the inclusion of a few menorahs or stars and crescents amidst a panoply of Christmas symbols that their particular religions were favored by the state, but that nonbelievers might infer from the celebration of three holidays with religious

significance that the state generally favored religion. It is obvious both from the stated holiday display policy and the trial evidence demonstrating its implementation that the defendants have been conscientious in signaling otherwise: celebrating Kwanzaa and the winter season generally along with Christmas, Chanukah, and Ramadan; focusing generally on the secular aspects of the religious holidays; and limiting holiday symbols with religious significance to those that did not depict a deity and, in the case of the menorah, had come to achieve general public recognition as the accepted symbol of the Chanukah holiday in multicultural holiday displays. As a result of these efforts, we can conclude, as the district court did, that any reasonable objective observer would perceive the effect of DOE holiday displays, even on young schoolchildren, to be a celebration of pluralism, not an endorsement, general or specific, of religion.

Whether the secular message of respect for diverse cultures could be conveyed as effectively without use of the menorah or the star and crescent is not constitutionally significant. *See Lynch v. Donnelly*, 465 U.S. at 682 n.7 (rejecting as "irrelevant" dissenters' argument that city's secular objectives could have been achieved without including crèche in holiday display); *accord County of Allegheny v. ACLU*, 492 U.S. at 635-36 (O'Connor, J., concurring in part and concurring in the judgment) (noting that endorsement conclusion did not depend on whether city had a more secular alternative to the menorah to represent Chanukah). An objective observer, seeing that school displays included menorahs together with kinaras and Christmas candles (among many other holiday symbols) would reasonably conclude that the message of pluralism was being conveyed to young children simply by showing them that different traditions, whether religious or not, light candles, sometimes in special candelabra (Chanukah and Kwanzaa), sometimes as

a single light (Christmas), to celebrate holidays. The very fact that the Kwanzaa candelabrum has no religious significance would allow schools to use it together with the menorah to communicate this secular message without risk of religious endorsement. *See id.* at 635-36 (observing that use of Christmas tree, a secular symbol, together with menorah confirmed that the message conveyed by the display was pluralism, not endorsement of religion). School displays further communicated a message of diversity and tolerance by showing children the gift-giving traditions and special food customs that were common features of various winter holiday celebrations. In sum, any reasonable observer would readily appreciate from the diverse holiday displays created pursuant to the DOE policy that no symbol was employed to endorse or denigrate any religious belief. Rather, the displays acknowledged the rich cultural diversity of New York City, permitting all children to feel included in some way in the holiday season while simultaneously teaching all children to understand and respect traditions and cultures different from their own.

The fact that the crèche might, in some contexts, also be used to communicate this secular message of pluralism, *see Lynch v. Donnelly*, 465 U.S. at 680-81; *Elewski v. City of Syracuse*, 123 F.3d at 55, does not mean that a reasonable observer would interpret the defendants' decision not to include this particular Christmas symbol as a sign of disapproval of Christianity. As we indicated in our discussion of purpose, we afford the government some leeway in policing itself to avoid Establishment Clause issues, even if it thereby imposes limits that go beyond those required by the Constitution. *See Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d at 476; *see also Locke v. Davey*, 540 U.S. at 718; *Walz v. Tax Comm'n*, 397 U.S. at 669. We presume that a reasonable observer, "aware of the history and context of the

community and forum in which the religious displays appears," *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment), would recognize this fact as well as the considerable litigation that, perhaps unfortunately, appears to be routinely triggered by public crèche displays. He would know that, at the same time that many devout Christians use crèches to commemorate the religious miracle of Christmas, these Christians and countless nonbelievers also share in the numerous secular traditions of the Christmas holiday, including the decoration of Christmas trees. He presumably would know that the Supreme Court had approved a holiday display in which Christmas was represented by a Christmas tree and Chanukah by a menorah to convey the permissible secular message of pluralism. He would recognize that menorahs had increasingly come to be used together with Christmas trees in secular public holiday displays throughout the City. Mindful of these circumstances, a reasonable observer would not think that a decision to disallow the crèche from school holiday displays but to recognize Christmas with a Christmas tree and a host of other secular symbols for this holiday signaled disapproval of the Christian religion or government endorsement of religion, whether generally or specifically.[28]

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[28] Our dissenting colleague concludes that a parent observer, "charged with such knowledge," nevertheless, "would not unreasonably perceive the State's endorsement of Judaism and Islam and disapproval of Christianity" in the challenged holiday display policy. *Post* at **[32 n.4]**. We cannot agree. No reasonable objective observer - who accepted the Supreme Court's menorah decision in *Allegheny*, who respected pluralism, who recognized that the public had (after *Allegheny*) increasingly come to accept the display of a menorah together with a Christmas tree as a symbol of tolerance and freedom associated with the holiday season, and who

Accordingly, we conclude that the defendant's holiday display policy, both as stated and as applied, satisfies the second "effect" or "endorsement" prong of the Lemon test.

c. Entanglement

The final prong of the *Lemon* test considers whether the challenged government action "foster[s] excessive state entanglement with religion." *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d at 425. Skoros submits that the defendants impermissibly entangle the public schools with religion when they attempt to categorize holiday symbols as secular or religious. While it might be preferable for the defendants to abandon this endeavor, particularly in light of their mischaracterization of the menorah (and possibly the star and crescent) as secular, we do not agree that such characterizations involve an excessive entanglement of church and state, when as here, they are made by government officials regulating only their own speech and when religious officials play no role in the government's holiday display decisions.

"Entanglement is a question of kind and degree." *Lynch v. Donnelly*, 465 U.S. at 684. As the Supreme Court explained in *Agostini v. Felton*, 521 U.S. at 232-33, the First Amendment does not prohibit all interaction between church and state. The entanglement of the two becomes constitutionally "excessive" only when it has "the effect of

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understood the continued controversy about the crèche's ability to communicate that same secular message – would think that the purpose or effect of the defendants' challenged policy was to signal to schoolchildren official endorsement of Judaism and Islam or disapproval of Christianity.

advancing or inhibiting religion." *Id.* at 233. Thus, entanglement analysis is properly treated as "an aspect" of Lemon's second-prong "inquiry into a statute's effect." *Id.*; *see Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d at 425. The factors relevant to determining excessive entanglement are "similar" to the factors used to determine effect; a court considers "'the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" *Agostini v. Felton*, 521 U.S. at 232 (quoting *Lemon v. Kurtzman*, 403 U.S. at 615). Applying these principles to this case, we note that the policy at issue affects only a public institution, the City's public schools. It provides no government benefit or aid to any religious institution or group. Nor does it affect the relationship between church and state by affording the former a role in defining legal standards or obligations. Rather, the policy provides guidance only to city employees in creating and installing holiday displays in public schools.

(1) Defendants' Actions Limit Only Government Speech

In characterizing certain holiday symbols as "secular," the defendants do not entangle church and state because their conclusions have no effect on private speech, either within a sectarian institution or a public forum. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. at 106-07 (holding that, in allowing school facilities to be used as a limited public forum for non-school functions, defendant could not discriminate against activities with religious viewpoint); *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. at 392-93 (same). Defendants' characterizations serve to discipline only their own speech to ensure that it conveys a

permissible secular message and does not appear to endorse religion, either generally or specifically.

As the Supreme Court has recognized, there is a "crucial difference" between government and private speech that endorses religion: while the former is forbidden by the Establishment Clause, the latter is protected by the Free Speech and Free Exercise Clauses. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. at 765 (plurality opinion) (rejecting First Amendment challenge to Ku Klux Klan display of a cross in an area deemed a public forum); *see id.* at 774 (O'Connor, J., concurring in part and concurring in the judgment). Thus, if the government were to attempt to define the secular and the religious as they affect a private organization, the government might well violate the First Amendment by entangling itself in religion through pervasive monitoring of private speech. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. at 127 (Scalia, J., concurring) (noting that, even if government were competent to distinguish between the secular and the religious, "the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable"); *cf. Walz v. Tax Comm'n*, 397 U.S. at 698 (Harlan, J., concurring) (explaining that tax exemption for religious properties was constitutional because "its administration need not entangle government in difficult classifications of what is or is not religious for any [private] organization").

This was the precise concern in *Lemon v. Kurztman*, 403 U.S. at 602, in which Rhode Island proposed to provide financial support for the non-sectarian curriculum of parochial schools. The Supreme Court declared the law unconstitutional, noting that the state would be required to entangle itself with religion by conducting "comprehensive,

discriminating and continuing surveillance" in the parochial schools to ensure that teachers in such institutions did not inject religion into their secular classes. *Id.* at 619. It would also have to inspect and evaluate parochial school records "to determine how much of the total expenditures is attributable to secular education and how much to religious activity." *Lemon v. Kurtzman*, 403 U.S. at 620. Thus, the law effectively "placed the State astride a sectarian school and [gave] it power to dictate [to the religious institution] what is or is not secular, what is or is not religious." *Id.* at 637 (Douglas, J., concurring).

This case involves no such state monitoring of non-government activities. The defendants do not attempt to inject state authority into any sectarian institution or to dictate to any private group or person outside the public schools any official view of what are the secular or religious symbols of particular holidays. The challenged DOE policy operates exclusively within public schools. Thus, to the extent the DOE must monitor the operation of its display policy within these schools, there is no entanglement concern because "with regard to restrictions the State must place on its own speech [to avoid endorsement], pervasive state monitoring is unproblematic." *Good News Club v. Milford Cent. Sch.*, 533 U.S. at 127 n.3 (Scalia, J., concurring). In any event, as the district court correctly observed, it is not the DOE's one-time characterization of the menorah and the star and crescent as secular symbols that requires constant monitoring. Rather, it is the ability of over a thousand City public schools to use these symbols, however characterized, in holiday displays without appearing to promote religion. *See generally Agostini v. Felton*, 521 U.S. at 232-33 (linking entanglement and effect inquiries); *cf. Lee v. Weisman*, 505 U.S. at 616-17 (Souter, J., concurring) (questioning Court's competence to distinguish between the sectarian and the ecumenical in concluding that

any prayer at graduation appears to endorse religion). For reasons already discussed in the immediately preceding section of this opinion, we conclude that, even if the DOE has mischaracterized the menorah and the star and crescent as secular symbols, it has satisfactorily ensured that these symbols are integrated into holiday displays so as to convey only a secular message of pluralism. City schools do not display these symbols to endorse or inhibit religion.

(2) The DOE Policy Does Not Cede Government Authority to a Sectarian Group or Take Sides in a Religious Dispute

Just as the DOE policy does not entangle church and state by insinuating government authority into any private religious institutions, nor does it do so by ceding government authority to any religious sect or group. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (observing that test for entanglement is whether government practice would "enmesh churches in the processes of government"). That concern prompted this court to invalidate New York's kosher fraud laws in *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415. There we explained that, by defining "kosher" by reference to "orthodox Hebrew religious requirements," *id.* at 423 (quoting New York statutes), and by creating an Advisory Board of Orthodox rabbis to consult with state enforcement authorities, New York had

> excessively entangle[d] government and religion [by] (1) tak[ing] sides in a religious matter, effectively discriminating in favor of the Orthodox Hebrew view of dietary requirements; (2) require[d] the State to take an official position on religious doctrine; and (3) create[d] an impermissible fusion of governmental and religious functions by delegating civic authority to

> individuals apparently chosen according to religious criteria.

Id. at 425. None of those concerns arises in this case.

With respect to the first two concerns, there is no doctrinal religious dispute here at issue on which New York City has taken sides or stated an official position so as to affect the expectations or rights of any religious groups. The DOE characterization of the menorah and the star and crescent as secular symbols operates only internally to guide public school authorities in creating permissibly secular holiday displays. Public school officials are routinely required to evaluate the secular significance of various works of literature, art, and philosophy in designing curricula. A decision to characterize Dante and Milton as secular rather than religious poets might be debatable among theologians, but such a DOE choice would raise no establishment concern unless the purpose and effect of teaching the *Inferno* or *Paradise Lost* was religious rather than literary. So in this case, the constitutionality of the DOE's decision to allow the menorah and the star and crescent to be used in school holiday displays does not depend on the accuracy of its characterization of these symbols as secular, but on the plainly secular purpose and effect of its holiday display policy. To the extent the defendants characterize the crèche differently from the menorah and the star and crescent and do not permit its inclusion in school holiday displays, that choice risks some "political divisiveness," as evidenced by this lawsuit. But the Supreme Court has made clear that this factor, by itself, is "insufficient . . . to create an 'excessive' entanglement." *Agostini v. Felton*, 521 U.S. at 233-34. A plaintiff must demonstrate that the government's challenged action advances or inhibits religion, *see id.* at 233, a contention we have already rejected.

As for the final concern noted in *Commack*, the record indicates no fusion of government and religious authority. The challenged holiday display policy was created and has always been implemented entirely by public employees pursuing a secular purpose. There is no history of religious authorities playing any role in determining what holiday symbols may be used in public school displays. *Cf. McCreary v. ACLU*, 125 S.Ct. at 2741 (invalidating Ten Commandments display where background evidence demonstrated history of religious purpose).

In sum, because the DOE holiday display policy does not involve excessive entanglement by government authorities intruding into religious affairs or religious authorities intruding into civic affairs, we conclude that it satisfies the final prong of *Lemon* analysis. Accordingly, like the district court, we conclude that Skoros's Establishment Clause challenge to the DOE's holiday display policy is appropriately rejected as without merit.

D. Skoros's Free Exercise Clause Challenge

Skoros asserts that, through holiday displays that secularized Christianity and promoted Judaism and Islam, the defendants "coerced" her children "to accept the Jewish and Islamic religions and to renounce [their] Christian religion." Am. Compl. at 8, ¶ 25. This Free Exercise claim is, in fact, simply a variation on Skoros's Establishment Clause challenge and, as such, requires less detailed discussion.

The Free Exercise Clause of the First Amendment embraces two concepts: "freedom to believe and freedom to act" on one's beliefs. *Cantwell v. Connecticut*, 310 U.S. at 303. The former freedom, which "forestalls compulsion by law of the acceptance of any creed or the practice of any form

of worship," is absolute; "in the nature of things, the second cannot be." *Id.* at 303-04; *see Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877-79 (1990); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d at 79. For reasons already discussed in some detail, we conclude that the record in this case fails to demonstrate that the purpose of the defendants' challenged actions was to impugn Skoros's children's religious beliefs or to restrict their religious practices. Absent such an objective, a Free Exercise claim will be sustained only if the "government has placed a substantial burden on the observation of a central religious belief," without "a compelling governmental interest justif[ying] the burden." *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384-85 (1990) (internal quotation marks omitted); *accord Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d at 79.

Skoros asserts that the defendants' holiday display policy substantially burdened her children's practice of their faith by recognizing and celebrating only the secular aspects of Christmas, while ignoring the holiday's religious significance. Skoros fails to demonstrate how such an exclusively secular focus would have burdened her children's ability to practice their faith. In any event, the evidence shows that the defendants did not completely ignore the religious significance of Christmas. In pursuing the secular purpose to promote respect for a variety of traditions and cultures, the DOE provided schools with instructional cards that described the origins – secular and religious – of all holidays represented in public school displays, including Christmas. While Skoros might think it helpful to her own efforts to rear her children as Catholics for the public schools to go further and to reinforce the religious message of her faith through holiday displays focusing on the religious rather than secular aspects of Christmas, the defendants' failure to do so cannot be ruled

a violation of the Free Exercise Clause. Just as government may not co[illegible]l any person to adopt a prescribed religious belief or f[illegible] of worship, no person may "require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986) (emphasis in original) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."). In *Allegheny*, the Supreme Court specifically ruled "that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine." 492 U.S. at 601. Accordingly, we conclude that, even if religious symbols of Christmas might be included in a secular holiday display without violating the Establishment Clause, there is no merit to Skoros's claim that the defendants must include such symbols to avoid violating the Free Exercise rights of Christian students.

With an equal lack of specificity or record evidence, Skoros submits that the defendants also burdened her children's practice of their religious faith by including the menorah and the star and crescent in school holiday displays. As a Free Exercise challenge, this argument is foreclosed by our decision in *Altman v. Bedford Central School District*, 245 F.3d 49. In *Altman*, plaintiffs asserted that a public school Earth Day celebration placed a substantial burden on the practice of the core religious beliefs of Catholicism in that a faculty member's "criticism of overpopulation of the Earth" could reasonably be construed to advocate birth control. *Id.* at 80. In rejecting this argument, this court observed that "[t]he mere evidence that plaintiffs found that remark and perhaps some other aspects of the ceremonies offensive to their beliefs . . . did not suffice to prove a free exercise

violation, for the court made no finding that students were required to participate in the Earth Day ceremonies." *Id.*

In the district court, Skoros sought to distinguish her case from *Altman* by asserting that her son, Christos, had in fact been required to make a menorah. While we recognize the menorah as a religious symbol, we find no record support for the conclusion that it was ever used by the defendants, either in a holiday display or craft project, to communicate a religious message or as part of a religious ritual.[29] The evidence shows only that Christos was given a booklet about Chanukah, with various pictures, including a cover design of a menorah, that could be colored. We need not decide whether Christos, a second grader, understood a difference between being "asked" or "assigned" to color the booklet. Even if coloring the booklet was an assignment, Skoros's letter to her son's teacher does not suggest any burden on her child's observance of his own faith. In praising her son's coloring of the menorah and reporting that she had played a dreidel game with him, Skoros made no complaint. She inquired only as to whether children would also be coloring religious symbols of Christmas. The fact that Skoros offered in evidence a nativity scene from a children's coloring book demonstrates how easily Christian parents could supplement school holiday craft projects with ones placing greater emphasis on the particular religious beliefs that they wish to instill in their children. In sum, there is no basis for her claim

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[29] By characterizing the menorah as a secular symbol, the DOE cannot, of course, ignore its responsibility to ensure that the menorah is not used in public schools in a religious ritual or displayed in a way that conveys a religious message. Nothing in the record, however, indicates that either concern arises in this case.

that defendants' actions encouraged her son to renounce Christianity.

In reaching this conclusion, we reiterate the point made in our earlier discussion of Skoros's Establishment Clause challenge: defendants "used" the menorah in holiday display projects not to promote Judaism but to teach children about diverse cultures and traditions through a common theme of celebration. *See Van Orden v. Perry*, 125 S.Ct. at 2869 (Breyer, J., concurring in the judgment). In pursuit of this secular purpose, on one day, the children in a particular class might have been asked to color menorahs, but on other days, those same children participated in making Christmas wreaths, Christmas stockings, kinaras, snowmen, snowflakes, and a host of other holiday symbols. Precisely because the menorah was being used together with such a broad array of holiday symbols for a secular pedagogical purpose, the challenged coloring assignment no more burdened the Free Exercise rights of a Catholic child than would a high school literature assignment that used an excerpt from the Old Testament rather than the New Testament, or the King James version of the Bible rather than the Vulgate. Accordingly, we reject Skoros's Free Exercise challenge as without merit.

E. Parental Rights

Skoros submits that the defendants' actions in promoting Judaism and Islam and denigrating Christianity violate her parental rights to control the religious upbringing and education of her children. We conclude that, in this case, Skoros has no parental right claim independent of the Establishment and Free Exercise claims that we have already rejected as without merit.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court recognized a parental right, derived from the First and Fourteenth Amendments, to control the religious upbringing of children. This right permits parents to educate their children outside the public schools, despite compulsory school attendance laws. *See Wisconsin v. Yoder*, 406 U.S. at 221-28; *see also Runyon v. McCrary*, 427 U.S. 160, 177 (1976). In *Leebaert v. Harrington*, however, this court ruled that this precedent affords parents no "fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children." 332 F.3d 134, 141 (2d Cir. 2003) (internal quotation marks omitted); *see also Stein v. Oshinsky*, 348 F.2d 999, 1002 (2d Cir. 1965) (Friendly, J.) (concluding that school authorities' decision not to permit student-initiated prayers in public schools against the desire of some parents did not violate constitutional rights of free exercise of religion and freedom of speech).

In *Leebaert*, a parent sued to have his son excused from attending a health program mandated by state law on the grounds that its curriculum with respect to sexuality was at odds with the religious beliefs in which he was rearing his child. 332 F.3d at 141. Skoros submits that her case is distinguishable from *Leebaert* because her challenge pertains not to a single class but to "the entire public school learning environment for Christians." Appellant's Br. at 53 n.20. We find this distinction unconvincing because the broad spectrum of public education issues is generally "committed to the control of state and local authorities." *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (internal quotation marks omitted). Certainly, public school authorities cannot devise curricula or rules that violate the Establishment or Free Exercise Clauses but, where, as in this case, no such violation is established, a parent cannot invoke a separate "fundamental right . . . to tell

a public school what his or her child will and will not be taught." *Leebaert v. Harrington*, 332 F.3d at 141 (collecting cases); *see also Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) (holding that "[w]hile parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right to direct how a public school teaches their child") (emphasis in original).

Like the district court, we conclude that Skoros fails to establish a claim for any violation of her parental rights.

III. Conclusion

To summarize, we conclude that New York City's holiday display policy, both on its face and as applied by the defendants, comports with the Establishment and Free Exercise Clauses of the First Amendment and does not violate a parent's right to control the religious upbringing and education of her children.

With respect to Establishment, we apply the three-part test outlined in *Lemon v. Kurtzman*, 403 U.S. 602, and conclude:

1. The holiday display policy serves a secular purpose: teaching pluralism by celebrating the City's rich cultural diversity and by encouraging schoolchildren to show respect and tolerance for traditions other than their own.

2. Although the policy mischaracterizes the menorah as a secular symbol, the policy nevertheless adequately ensures that the menorah is displayed in public schools only with a variety of other holiday symbols to promote pluralism and tolerance, not to endorse religion. The same

conclusion applies to the policy's treatment of the star and crescent.

3. Because the City's secular characterizations of the menorah and the star and crescent discipline only government speech with no government authorities intruding into religious affairs and no religious authorities intruding into civic affairs, the display policy involves no excessive entanglement of church and state.

We hold that no different conclusion is dictated by the City's decision not to allow the crèche to represent Christmas in public school holiday displays. We do not here decide whether the City could, consistent with the Constitution, include a crèche in its school holiday displays. We conclude only that the defendants do not violate the Establishment Clause when, in pursuing the secular goal of promoting respect for the City's diverse cultural traditions, they represent Christmas through a variety of well recognized secular symbols at the same time that they represent Chanukah through the menorah and Ramadan through the star and crescent.

With respect to Free Exercise, we conclude that no record evidence supports Skoros's claim that the City's holiday display policy coerced her children to embrace Judaism or Islam or to renounce their Catholic faith.

Finally, because the City policy does not violate the Establishment and Free Exercise Clauses, we conclude that it does not impinge Skoros's right to control the religious upbringing and education of her children.

The February 20, 2004 judgment of the district court in favor of the defendants is AFFIRMED.

STRAUB, *Circuit Judge,* concurring in part and dissenting in part:

Today, the majority approves a policy directed at the participation of public school children in a year-end holiday celebration that utilizes religious symbols of certain religions, but bans the religious symbol of another. As I do not understand the law to countenance such in respect of the most impressionable of our society, I respectfully dissent from the majority's decision on the Establishment Clause claim asserted by Plaintiff Andrea Skoros ("Skoros"). I concur, however, in the majority's affirmance of the District Court's rejection of Skoros's Free Exercise and parental rights claims.

I. Establishment Clause Claim

It is my view that the policy of the New York City Department of Education ("DOE") to arrange for the children to celebrate the holiday season in schools through the use of displays and activities that include religious symbols of the Jewish holiday of Chanukah and the Muslim commemoration of Ramadan, but starkly exclude any religious symbols of the Christian holiday of Christmas, fails under the endorsement prong of the *Lemon* test, both on its face and as applied. My chief disagreement with the majority is as to the "reasonable observer" in this case. It is my view that we must view the displays and celebrations from the perspective of elementary or secondary school students in the New York City public school system, as well as from the perspective of parents of such students who experience the displays through and with their children and who have knowledge of the history and context of the policy and displays. In failing to examine the displays and celebrations from the perspective of the students, the majority pays only lip service, and indeed, effectively

turns a blind eye, to the significant impact of the students' impressionability and youth.

Keeping those two relevant factors in mind, and erring on the side of protecting such children in the face of less-than-clear Supreme Court precedent, I would hold that the policy and displays send the message of endorsement of Judaism and Islam to a reasonable student observer. I would also hold that the displays convey to a reasonable parent observer that Judaism and Islam are favored and that Christianity is disfavored. Furthermore, I would also hold that the DOE's policy risks excessive entanglement inasmuch as it adopts an official State position on a point of religious doctrine by defining a menorah and star and crescent as secular symbols, and a "crèche" as "purely religious."

A. Background

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend I. This prohibition applies to the states through the Fourteenth Amendment. *See Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 301 (2000). As the majority notes, the Supreme Court precedent dealing with the Establishment Clause is marked by "frequently splintered Supreme Court decisions," *ante* at **[21],** and the Court's members "have rarely agreed – in either analysis or outcome – in distinguishing the permissible from the impermissible public display of symbols having some religious significance," *ante* at **[22].** Two recent decisions of the Supreme Court, *Van Orden v. Perry,* — U.S. —, 125 S.Ct. 2854 (2005), and *McCreary County v. ACLU of Kentucky,* — U.S. —, 125 S.Ct. 2722 (2005), examining the constitutionality of two public displays of the Ten

Commandments, constitute the Court's latest pronouncements on the Establishment Clause.

In *Van Orden,* the plurality explicitly declined to disavow completely the "test" set forth in *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971), which provides that a court examining whether a governmental practice violates the Establishment Clause must consider: (1) whether the challenged practice has a secular purpose, (2) whether the practice either advances or inhibits religion in its principal or primary effect, and (3) whether the practice fosters excessive government "entanglement" with religion. That said, the plurality in *Van Orden* held that the *Lemon* test was "not useful in dealing with the sort of passive monument" as the Ten Commandments display at issue there. 125 S.Ct. at 2861. According to the plurality, the analysis in such a case should be driven "both by the nature of the monument and by our Nation's history." *Id.* Examining the Texas display in such context, including, e.g., the role played by the Ten Commandments in our Nation's history, the plurality concluded that the State of Texas did not violate the Establishment Clause by its display of the Ten Commandments monument on the grounds of its capitol. *Id.* at 2864.

The plurality emphasized, however, that the public classroom presents a different context. The plurality distinguished the "passive use" of the Ten Commandments text by the State of Texas from the impermissible use of the text by the State of Kentucky in *Stone v. Graham,* 449 U.S. 39 (1980) (per curiam), where displays of the Ten Commandments in public schools "confronted elementary school students every day." *Id.* at 2864.

Justice Breyer, in a concurring opinion that created a majority as to the result, emphasized that "no single mechanical formula . . . can accurately draw the constitutional line in every case," *id.* at 2868 (Breyer, J., concurring in the judgment), and that "[w]hile the Court's prior tests provide useful guideposts . . . no exact formula can dictate a resolution to such fact-intensive cases," *id.* at 2869 (internal citation omitted). Justice Breyer noted that the text of the Ten Commandments "undeniably has a religious message," but cautioned that "focusing on the text of the Commandments alone cannot conclusively resolve th[e] case." *Id.* Rather, Justice Breyer stated, the display ought be examined for "how the text [of the Ten Commandments] is *used,*" which inquiry requires us to "consider the context of the display." *Id.* Justice Breyer concluded that the "circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State" intended the monument's non-religious message "to predominate." *Id.* at 2870. Justice Breyer also found it significant that "40 years [had] passed in which the presence of this monument, legally speaking, went unchallenged." *Id.* According to Justice Breyer, "those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort" to favor, engage in, compel, or deter, religion. *Id.* Justice Breyer also emphasized that the display in *Van Orden* presented a much different context than one "on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state." *Id.* at 2871.

In *McCreary County v. ACLU of Kentucky*, — U.S. —, 125 S.Ct. 2722 (2005), Justice Souter, writing for the

majority, also explicitly declined the petitioners' request to abandon the *Lemon* test, *id.* at 2734-35, and instead applied *Lemon* in that case and found that the Ten Commandments display at issue violated the Establishment Clause insofar as it failed the first prong of the *Lemon* test, *i.e.*, the display was created with a religious purpose. The Court held that "the development of the presentation" should be considered in determining the purpose of a display, *id.* at 2728, and noted that the county's initial decision to install the Ten Commandments display, and later decision to amend the display, were undertaken with the impermissible intent to advance religion. *Id.* at 2738-40. The Court also found that the stated secular purpose of the final iteration of the display was presented merely as "a litigating position" and did not "repeal[] or otherwise repudiate[]" the initial purposes. *Id.* at 2740.

In light of the foregoing, I find it appropriate in the instant case to apply the *Lemon* test, with some concern for the display's "context." The Supreme Court's recent opinions indicate that an examination of the purpose of a display, *see McCreary County,* 125 S.Ct. at 2732, and its particular context, *see Van Orden,* 125 S.Ct. at 2869-70 (Breyer, J., concurring in the judgment), are relevant considerations under the Establishment Clause, and that the *Lemon* test is still viable, *see McCreary County,* 125 S.Ct. at 2734-35, although there is "no test-related substitute for the exercise of legal judgment," *Van Orden,* 125 S.Ct. at 2869 (Breyer, J., concurring in the judgment).

As the majority notes, under *Lemon,* a court examining whether a governmental practice violates the Establishment Clause must consider: (1) whether the challenged practice has a secular purpose, (2) whether the practice either advances or inhibits religion in its principal or primary effect, and

(3) whether the practice fosters excessive government "entanglement" with religion. *See Elewski v. City of Syracuse,* 123 F.3d 51, 55 (2d Cir. 1997). The second prong is an "endorsement" test, which asks whether "a reasonable observer of the display in its particular context [would] perceive a message of governmental endorsement or sponsorship of religion." *See id.* at 53; *see also County of Allegheny v. ACLU,* 492 U.S. 573, 593 (1989) (the Establishment Clause "'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*'" (quoting *Wallace v. Jaffree,* 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment))); *Lynch v. Donnelly,* 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (the Establishment Clause prohibits "making adherence to a religion relevant in any way to a person's standing in the political community").

The endorsement test "'necessarily focuses upon the perception of a reasonable, informed observer [who] must be deemed aware of the history and context of the community and forum in which the religious display appears.'" *Elewski,* 123 F.3d at 54 (alteration in original) (quoting *Creatore v. Town of Trumbull,* 68 F.3d 59, 61 (2d Cir. 1995) (internal quotation marks omitted)). The endorsement test "requires careful and often difficult linedrawing and is highly context specific." *Allegheny,* 492 U.S. at 631 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 597 ("The effect of the government's use of religious symbolism depends upon its context. . . . Our present task is to determine whether the display of the crèche and the menorah, in their respective 'particular physical settings,' has the effect of endorsing or disapproving religious beliefs."). As the Supreme Court stated in *Lynch,* in each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be

framed." 465 U.S. at 678. We noted in *Altman v. Bedford Central School District,* 245 F.3d 49 (2d Cir. 2001), that, in analyzing an Establishment Clause claim in the public school context, we must also consider whether the government is "'coercing anyone to support or participate in religion or its exercise.'" *Id.* at 75 (quoting *Santa Fe,* 530 U.S. at 302 (quoting *Lee v. Weisman,* 505 U.S. 577, 587 (1992))).

As noted in the plurality opinion in *Van Orden* and in Justice Breyer's concurrence, the "context" of a display matters significantly. Indeed, in *Edwards v. Aguillard,* 482 U.S. 578 (1987), the Court counseled that we must be

> particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the students and his or her family. Students are impressionable and their attendance is involuntary. . . . [T]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the state is it more vital to keep out divisive forces than in its schools.

Id. at 583-84 (internal citations and quotation marks omitted).

B. Analysis

Employing the *Lemon* analysis and keeping in mind the Court's directive in *Edwards,* I find that the DOE's policy and the attendant displays and celebrations violate the Establishment Clause. This conclusion is informed by the fact that the Supreme Court precedent dealing with the Establishment Clause is marked by, as the majority concedes, "frequently splintered Supreme Court decisions," *ante* at **[21]**, and a less-than-clear statement of the law that results in courts analyzing such displays using what one Justice characterized as "little more than intuition and a tape measure," *Allegheny,* 492 U.S. at 675 (Kennedy, J., concurring in the judgment in part and dissenting in part). Indeed, the fine line-drawing and potential for error in an Establishment Clause analysis requires that we err on the side of protecting New York City schoolchildren from any suggestion that the State disapproves of their religion.

I begin my analysis with the first factor in the *Lemon* inquiry, purpose.

1. Purpose

I agree with the majority that the DOE's asserted purpose in effectuating the Holiday Display Memorandum, *i.e.,* to celebrate the secular holiday season, is a secular one, *see Lynch,* 465 U.S. at 681 (finding intent to celebrate the secular holiday season to be a "legitimate secular purpose[]").[1] I also

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[1] Although the majority phrases the DOE's stated purpose slightly differently, *ante* at **[32]**, any dispute is merely semantic; even the District Court characterized the DOE's purpose as "the celebration of multiple winter holidays," *Skoros v. City of New*

agree that this claimed purpose is not a sham. Thus, to the extent that the first prong of the *Lemon* test inquires into the State's "actual purpose" and its "subjective" intent to communicate a particular message, *id.* at 690 (O'Connor, J., concurring), I would agree that the defendants do not run afoul of the first prong.

On the other hand, as noted by the majority, the Supreme Court's recent decision in *McCreary* may suggest a shift in the inquiry, insofar as it states that purpose should be determined by an "objective observer." *See McCreary,* 125 S.Ct. at 2734-35. If, following *McCreary,* the question focuses more on the government's intent as *perceived* by an "objective" or "reasonable" observer in the community, my conclusion as to purpose would be different. As explained below with respect to the second *Lemon* factor, I would find that, however the "objective observer" is defined, the observer would perceive the school's intent as conveying a message about religion and as a celebration of religious holidays, rather than as a celebration of the secular holiday season. Ultimately, however, I believe these concerns are better addressed under the second prong of the *Lemon* test, which inquires into the *effect* of the display on its observers and "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch,* 465 U.S. at 690 (O'Connor, J., concurring).

York, No. CV-02-6439 (CPS), 2004 U.S. Dist. LEXIS 2234, at *29 (E.D.N.Y. Feb. 18, 2004).

2. Endorsement and the Effects Inquiry

As explained above, the second inquiry of the *Lemon* test is designed to prevent government practices that "have the effect of communicating a message of government endorsement or disapproval of religion," and that have the effect, "whether intentionally or unintentionally, [of] mak[ing] religion relevant, in reality or public perception, to status in the political community." *Id.* at 692. With respect to the effects inquiry, I depart from the majority on two points: (a) how to identify the relevant reasonable observers; and (b) whether the message conveyed is fairly understood as an endorsement or disapproval of certain religions.

a. The Reasonable Observer

As the majority notes, the Supreme Court in *Allegheny* adopted the endorsement test proposed by Justice O'Connor in *Lynch,* making the relevant question for the second prong of *Lemon* inquiry whether a particular display, in context, "has the effect of endorsing or disapproving religious beliefs." *County of Allegheny v. ACLU,* 492 U.S. 573, 597 (1989). In her concurrence in *Allegheny,* Justice O'Connor further described the endorsement test in terms of "a reasonable observer [who] evaluates whether a governmental practice conveys a message of endorsement of religion." *Id.* at 630 (O'Connor, J., concurring in part and concurring in the judgment). Following *Allegheny,* Justice O'Connor recognized a "fundamental point of departure" concerning "the test's reasonable observer" who evaluates the message conveyed. *Capitol Square Review & Adv. Bd. v. Pinette,* 515 U.S. 753, 778, 115 S.Ct. 2440 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (internal quotation marks omitted). The endorsement test, Justice O'Connor explained, should not "focus on the actual

perception of individual observers, who naturally have differing degrees of knowledge." *Id.* at 779. Instead, "the endorsement test creates a more collective standard to gauge 'the "objective" meaning of the [government's] statement in the community.'" *Id.* (alteration in original) (quoting *Lynch,* 465 U.S. at 690). The applicable observer is "a personification of a community ideal of reasonable behavior determined by the collective social judgment." *Id.* at 780 (alteration and internal quotation marks omitted). In that regard, Justice O'Connor explained that "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears." *Id.*

The focus of Justice O'Connor's reasoning, however, was on avoiding the possibility that a practice may be struck down "simply because a particular viewer of a display might feel uncomfortable." *Id.* The endorsement test remains grounded in the "essential command of the Establishment Clause": preventing government from "making a person's religious beliefs relevant to his or her standing in the community," and from "sending a clear message" to individuals that "they are outsiders or less than full members of the political community." *Allegheny,* 492 U.S. at 627 (O'Connor, J., concurring in part and concurring in the judgment). To this extent, the perspective of a "reasonable observer" must depend upon "'the community and forum in which the religious display appears.'" *Elewski,* 123 F.3d at 54 (quoting *Creatore,* 68 F.3d at 61 (internal quotation marks omitted)). That is, although we will imbue the observer with certain degrees of reasonableness and levels of knowledge, we must not lose focus on who is actually the recipient of the message conveyed and how that message will affect such a recipient.

Thus, in *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), as the majority concedes, the Supreme Court viewed the alleged Establishment Clause violation from the perspective of an objective high school student. *See id.* at 307 ("The expressed purposes of the policy encourage the selection of a religious message, and that is precisely how *the students* understand the policy." (emphasis added)); *id.* at 308 ("[A]n *objective Santa Fe High School student* will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." (emphasis added)). There, the court found unconstitutional under the Establishment Clause a pre-football game prayer led by a high school student who was elected student council chaplain insofar as the activity had a religious purpose and "the members of the listening audience must perceive the pre-game message as a public expression of the views of the majority of the student body delivered with the approval of the school administration." *Id.* at 308. The Court also cast schoolchildren as the reasonable observers in *Board of Education of Westside Community Schools (District 66) v. Mergens,* 496 U.S. 226, 249-52 (1990) (examining whether "an objective observer in the position of a secondary school student will perceive official school support for . . . [on-campus] religious meetings"), and other courts have done so as well, *see, e.g., Kitzmiller v. Dover Area School Dist.*, 400 F. Supp. 2d 707, 2005 WL 3465563, at *7, *14-15 (M.D. Pa. Dec. 20, 2005) (viewing curriculum of intelligent design from the perspective of schoolchildren for purposes of determining Establishment Clause violation); *Verbena United Methodist Church v. Chilton County Bd. of Educ.,* 765 F. Supp. 704, 711 (M.D. Ala. 1991) ("In cases involving schoolchildren, the operative inquiry is whether an 'objective observer' in the position of a student of the relevant age would 'perceive official school support' for the religious activity in question." (quoting *Mergens,* 496 U.S. at 249)).

The perspective of a student is relevant in both an endorsement inquiry and in an examination of a practice's coercive potential. *Compare Santa Fe,* 530 U.S. at 307-10 (examining whether students would perceive school endorsement of religious prayer at football game), and *Mergens,* 496 U.S. at 249-52 (examining whether students would perceive school endorsement of religion by meetings of religious student groups on school grounds), *with Santa Fe,* 530 U.S. at 310 (examining whether dissenting students would feel coercion to participate in religious observances), *and Lee,* 505 U.S. at 593 (considering the perspective of "the dissenter of high school age" in determining whether graduation ceremony coerced religious exercise).

In this case, the primary audience is the schoolchildren "for whose benefit these displays are created" and who "have no option but to view them and, sometimes, participate in the craft projects integral to many of the displays." *Ante* at **[59].** Given that they are the most direct observers of the displays and participants in the celebrations, I believe that we must inquire into the effect of the policy and displays on reasonable elementary and secondary schoolchildren.[2]

The majority, in contrast, frames the reasonable observer as "an adult who is aware of the history and context of the community and forum in which the religious display appears,

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[2] At the time the suit was brought, Nicholas Tine was ten years old, and Christos Tine was nine years old. They are both students in elementary public schools under the aegis of the DOE. Therefore, for the "as applied" challenge, the reasonable student observer is an elementary school student, and, because the policy applies to all New York City public schools, the facial attack requires us to consider the reasonable student observer to be either an elementary school child or a secondary school student.

and who understands that the display of a religious symbol in a school context may raise particular endorsement concerns, because of the pressure exerted on children by the law of imitation." *Ante* at **[57]** (internal citations and quotation marks omitted). The majority takes this approach largely because, it says, "it makes no sense at the effect step to view a kindergarten child or first grader as someone 'fully cognizant of the history, ubiquity, and context of the practice in question,'" *id.* at **[56]** (quoting *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 34-35 (2004) (O'Connor, J., concurring in the judgment)), and because "of the range of the students to whom the challenged display policy applies," *ante* at **[56].** The majority cites *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), as analogous, but that case merely holds that we must view "coercive pressure" to engage in *after-school* activities from the perspective of the parents of elementary school students, rather than from the students' perspective, where those activities required *parental consent* for participation. *See id.* at 115 ("It is the parents who choose whether their children will attend the Good News Club meetings. Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in Good News Club's religious activities."). Here, in contrast, the displays are exhibited during school hours and may be viewed without parental consent, as with the celebrations.

Furthermore, the majority determines the reasonable observer in a backwards fashion. I understand Justice O'Connor's "reasonable observer" inquiry as imputing certain levels of knowledge and reasonableness where appropriate for the intended audience. The majority, however, defines the applicable observer not according to the primary audience, but according to who would have the typical levels of knowledge.

While I acknowledge that it is difficult to impute awareness of history and culture to children, I cannot see how or why we should conduct an effects test that does not examine the effects on the most direct observers. Moreover, the effects inquiry must take into account the context of the displays. *See Allegheny,* 492 U.S. at 597; *Elewski,* 123 F.3d at 54. In this case, a crucial aspect of the context is that the displays are in elementary schools and are directed at children who lack a broader knowledge of history and culture. *See Lee v. Weisman,* 505 U.S. 577, 597 (1992) (explaining that "[o]ur Establishment Clause jurisprudence remains a delicate and fact-sensitive one," and that prior precedent "requires us to distinguish the public school context"). Indeed, it is particularly because of a child's lack of broader knowledge – and thus the lack of a broader ability to contextualize and analyze a display – that children are uniquely vulnerable to government messages of endorsement or disapproval. *See id.* at 592 ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."); *Sch. Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 390 (1985) (explaining that the effects inquiry "must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years . . . [because their] experience is limited and [their] beliefs consequently are the function of environment as much as of free and voluntary choice"), *overruled on other grounds, Agostini v. Felton,* 521 U.S. 203 (1997); *Brandon v. Board of Ed. of Guilderland Cent. Sch. Dist.,* 635 F.2d 971, 978 (2d Cir. 1980) ("To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit. . . . Misconceptions over the appropriate roles of church and state learned during one's school years may never

be corrected." (citations omitted)); *Selman v. Cobb County School Dist.*, 390 F. Supp. 2d 1286, 1311 (N.D. Ga. 2005) (holding that sticker on textbook providing that evolution was theory was likely to convey a message of endorsement "given the Sticker's intended audience, impressionable school students"); *Joki v. Bd. of Educ.*, 745 F. Supp. 823, 831 (N.D.N.Y. 1990) (emphasizing impressionability of children in holding that display of painting with religious theme in high school auditorium had effect of conveying message of endorsement of religion). Indeed, Justice Blackmun stated that the outcome in *Allegheny* might have been different had it involved a public school, and he refused to hold that "the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations." *Allegheny*, 492 U.S. at 620 n.69. It is precisely those additional constitutional considerations that concern me in this case. Indeed, as the majority at bottom concedes, the impressionability of the child is paramount here.

In light of the foregoing, I believe that we must view the displays and celebrations from the perspective of the students in the relevant elementary and secondary public schools. And, as will be explained below, I believe that a reasonable schoolchild would view the displays and celebrations as conveying endorsement of the *religious* holidays depicted – Chanukah and Ramadan – rather than a general celebration of a secular holiday season.

I also believe, however, that schoolchildren are not the only relevant observers in this case. The displays' messages are also conveyed to the children's parents both directly (upon, for example, a parent's visit to the school), and indirectly, as parents hear about the holiday programs and

celebrations through their children and assist them in creating presentations for display at school. As with the children, the parents make up the "community" of the school, and thus I believe we should also inquire into the effect on a reasonable parent. This "reasonable parent observer" is not the same hypothetical non-student "adult" observer identified by the majority. The majority's hypothetical non-student "adult" observer is not an "observer" at all, or rather, is an observer once removed. That is, the observer speculates as to how a child would observe the display and then purports to give its own "observation" of what it thinks a child would "observe." A court must, however, consider the display in its particular "context" and "community"; it must take care not to impose its own perspective on the hypothetical reasonable person. Here, therefore, a parent of a student is the relevant adult observer. The reasonable parent observer is certainly more informed of the history and cultural context underlying the policy and displays than the reasonable student observer. For reasons explained fully below, it is my view that a reasonable parent observer, viewing the displays as depicting religious iconography of Judaism and Islam but as conspicuously excluding the religious – as opposed to purely secular – symbols of Christmas, would perceive the displays as sending the message that Judaism and Islam are favored and that Christianity is disfavored.

b. Analyzing the Effect

The DOE's policy purports to allow public schools to celebrate the secular holiday season and commemorate that season with certain decor. The policy by its terms limits that decor to what it defines as "secular" symbols, including without limitation a Christmas tree, a menorah, and a star and crescent. The DOE also concedes that it interprets the policy to prohibit the display of a nativity scene or crèche and

characterizes such a symbol as "purely religious." Appellees' Brief at 9; Joint Stip. of Facts at ¶ 13.

It cannot be gainsaid that the menorah and star and crescent are religious symbols. *See, e.g., Allegheny,* 492 U.S. at 613 ("The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively religious."); *Kaplan v. City of Burlington,* 891 F.2d 1024, 1026 (2d Cir. 1989) ("A menorah is a religious symbol of the Jewish faith, and is recognized as such by the general public."); *The Oxford Dictionary of World Religions* 246 (John Bowker ed., Oxford University Press 1997) (identifying the crescent moon as a "religious emblem of Islam, derived from the Quranic recognition of the waxing and waning of the moon as a sign of God's unchanging purpose and control" and noting that the "crescent on the cupola of a mosque indicates the direction of Mecca"); Annemarie Schimmel, *Islamic Iconography, in 7 The Encyclopedia of Religion* 64, 66 (Mircea Eliade ed., MacMillan Publishing Co. 1987) (stating that the crescent "has come to be regarded as the typical sign of Islam" and "now is generally seen as the Islamic equivalent of the Christian cross," "although its first appearance on early Islamic coins, metalwork, and ceramics had no religious connotations"). The majority concedes as much, *ante* at **[35-36 & n.16],** and indeed, concludes that a menorah and star and crescent are as religious in nature as a crèche, *ante* at **[51-52].** Moreover, though neither a menorah nor a star and crescent *depict* a deity, both relate directly to a deity - God performed the miracle exemplified by the menorah, and the crescent depicts the waxing and waning of the moon as a sign of God's purpose and control over the universe.

A Christmas tree, however, is a purely secular symbol. *See, e.g., County of Allegheny v. ACLU,* 492 U.S. 573, 616 (1989) ("The Christmas tree, unlike the menorah, is not itself a religious symbol."); *Laurence H. Tribe, American Constitutional Law* § 14-15, at 1295 (2d ed. 1988) (noting that history has "neutralized" the Christmas tree, which was "once associated with the Tree of Life in the Garden of Eden" (citing *ACLU v. City of St. Charles,* 794 F.2d 265, 271 (7th Cir. 1986) (citing Thomas G. Crippen, *Christmas and Christmas Lore* 153 (1923), and *II Encyclopaedia Britanncia: Micropaedia* 904 (15th ed. 1975))). Furthermore, though the District Court and majority attempt to characterize some of the stars depicted in the displays as "Stars of Bethlehem," *ante* at **[52-53 n.24],** there is nothing in the displays that suggests such a conclusion. The other "Christmas" symbols the DOE allows to be displayed as part of the secular holiday celebration are purely secular. As Judge Posner noted in *American Civil Liberties Union v. St. Charles,*

> [t]here is nothing distinctively Christian about reindeer, Santa Claus, gift-giving, eggnog, tinsel, toys, retail sales, roast goose, or the music (as distinct from the words) of Christmas carols. Some symbols that are Christian – such as the holly wreath, which both symbolizes Christ's hegemony (wreaths and garlands being a traditional symbol of kingship and prowess) and recalls the crown of thorns that was placed on His head before He was crucified, to mock His supposed Kingship - have lost their Christian connotations. They are regarded by most people, including most Christians, as purely decorative. . . . The five-pointed star of Bethlehem, while unmistakably a part of the story of the birth of Jesus Christ, is the same star used in the American flag, and

> in many other secular settings; it, too, has lost its religious connotations for most people.

794 F.2d at 271 (internal citations omitted). Finally, contrary to the District Court's finding, a crèche, or nativity scene, depicts a historical event and thus, has some non-religious aspect to it.

A parent who fully understands "the history, ubiquity, and context" of the policy and displays, *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 40 (2004) (O'Connor, J., concurring in the judgment), and who experiences the displays either in person or through working with his or her child at home, would not unreasonably perceive a difference in the manner in which the different religions are treated by the schools. The parent would certainly understand that the menorah and star and crescent are symbols of great significance in the Jewish and Muslim religions. They would also understand that Christmas is represented by objects that are purely secular, if not, pagan (Christmas trees, snowmen, snowflakes, wreaths, stockings, Santa Claus figures, gingerbread men, and wrapped gifts). The parent would note that Jewish and Muslim students are allowed to create and observe symbols that are consistent with those they have viewed from a young age in their religious celebrations at home and in their places of worship, while Christian students are not. The reasonable parent observer would also be aware of Ms. Skoros's request to add a crèche to the list of approved symbols, and the DOE's rejection, as well as the public correspondence between the two. In light of the foregoing, it is my view that the reasonable parent observer would understand the inclusion of religious symbols of the Jewish holiday of Chanukah and the Muslim commemoration of Ramadan, and exclusion of any religious symbols of the Christian holiday of Christmas, to convey the State's approval

of Judaism and Islam and disapproval of Christianity. The touchstone of the Establishment Clause, its principle of neutrality, forbids such favoritism. *See McCreary County v. ACLU of Kentucky,* — U.S. —, 125 S.Ct. 2722, 2742 (2005) ("[T]he government may not favor one religion over another."); *Board of Ed. of Kiryas Joel Vill. Sch. Dis. v. Grumet,* 512 U.S. 687, 706 (1994) (invalidating a state law that created a separate school district to serve a community of highly religious Jews exclusively because it "singled out a particular religious sect for special treatment"). As then-Chief Justice Bird of the California Supreme Court noted in *Fox v. Los Angeles,* 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978):

> When a city so openly promotes the religious meaning of one religion's holidays, the benefit reaped by that religion and the disadvantage suffered by other religions is obvious. Those persons who do not share those holidays are relegated to the status of outsiders by their own government; those persons who do observe those holidays can take pleasure in seeing the symbol of their belief given official sanction and special status.

22 Cal. 3d at 803, 587 P.2d at 670, 150 Cal. Rptr. at 874 (Bird, C.J., concurring).

It is also my view that a reasonable *student* observer would view the displays and celebrations as conveying the endorsement of Judaism and Islam. A Jewish or Muslim student viewing the displays or completing assignments in connection with the displays would understand the religious nature of the menorahs and stars and crescents and would understand that the symbols represent Chanukah and Ramadan. Jewish and Muslim students would find the

symbols consistent with those they view in their religious celebrations at home and in their places of worship. A young student, therefore, would likely be confused as to whether the activity is meant to celebrate the secular "winter holiday season" or whether it is meant to celebrate Chanukah and Ramadan as religious holidays. We must remind ourselves that we are dealing with "impressionable children" who are likely to "perceive, however wrongly," the imprimatur of state approval of religion. *Tribe, supra* § 14-6, at 1178-79. There is a fine line between the celebration of the secular "winter holiday season" and the celebration of the three religious events of Christmas, Chanukah, and Ramadan; it is a distinction with which a young child will likely have more difficulty than an adult. The majority concedes that the religious significance of religious symbols may be more obvious to schoolchildren, *ante* at **[52]**. Because of the content of the displays, the children would fairly understand the purpose of the displays (and their own acts in creating the displays) to be the celebration of Chanukah and Ramadan as religious holidays. *See Allegheny,* 492 U.S. at 595 ("[T]he question is 'what viewers may fairly understand to be the purpose of the display.'" (quoting *Lynch,* 465 U.S. at 692 (O'Connor, J., concurring))); *see also Stone v. Graham,* 449 U.S. 39, 42 (1980) (holding that "[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments"). Such is inconsistent with the Establishment Clause. *See Allegheny,* 492 U.S. at 614-15 ("If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause. The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.").

Because of the young age of the children and the particular objects allowed in the displays here, the display's setting does not "negate[] any message of endorsement" of the Jewish beliefs represented by the menorah or the Muslim beliefs represented by the star and crescent. *Lynch,* 465 U.S. at 692 (O'Connor, J., concurring). There is a great risk that a young student will perceive the government as endorsing the religious message of the religious symbols chosen for presentation. This case is thus unlike the cases cited by the majority involving holiday displays on public property, because the mere fact that the displays here contains symbols associated with different religions and some non-religious symbols will not necessarily dilute or change the focus from a religious message to something else. *See Elewski v. City of Syracuse,* 123 F.3d 51, 54 (2d Cir. 1997) ("[I]f [a symbol]'s context . . . neutralizes the message of governmental endorsement, then the [symbol] passes muster under the Establishment Clause."). The secular message of pluralism – what saved the holiday displays in *Lynch* and *Allegheny* – will not necessarily come across in the participatory public school context.

The majority takes issue with the dissent's "cast[ing] schoolchildren of . . . varying . . . religious backgrounds" as the reasonable observers in this case. *Ante* at **[44].** Any Establishment Clause inquiry in public schools must, however, determine whether "school sponsorship of a religious message . . . sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 309-10 (2000) (quoting *Lynch,* 465 U.S. at 688 (O'Connor, J., concurring)). In order to examine whether a display sends such message,

we must consider the perspective of adherents and nonadherents alike. *See Kaplan v. City of Burlington,* 891 F.2d 1024, 1030-31 (2d Cir. 1989) (considering the views of "members of minority religions or nonbelievers" as well as "members of the majority faith" in Establishment Clause inquiry); *Selman v. Cobb County School Dist.*, 390 F. Supp. 2d 1286, 1306 (N.D. Ga. 2005) (concluding that sticker concerning evolution "sends a message to those who oppose evolution for religious reasons that they are favored members of the political community . . . [and] sends a message to those who believe in evolution that they are political outsiders"); *see also Capitol Square Review & Adv. Bd. v. Pinette,* 515 U.S. 753, 799 (1995) (Stevens, J., dissenting) ("It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief [the display] expresses."); Benjamin I. Sachs, Case Note, *Whose Reasonableness Counts?,* 107 YALE L. J. 1523, 1526 (1998). Indeed, in *Santa Fe,* the Supreme Court considered the possible impressions of the students who supported the religious message, as well as those "dissenter" or "nonbeliever" students. *See Santa Fe,* 530 U.S. at 305 ("[W]hile Santa Fe's majoritarian election might ensure that most of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense."); *see id.* ("Contrary to the District's repeated assertions that it has adopted a 'hands-off' approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. . . . [T]he degree of school involvement makes it clear that the pregame prayers bear the imprint of the State and thus put school-age children who objected in an untenable position." (internal quotation marks omitted)). In *Lee v. Weisman,* in the context of coercion, the Supreme Court considered the effect of the religious graduation speech from the perspective of adherents as well as of the "dissenter of

high school age." 505 U.S. 577, 593 (1992) ("[F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. . . . [A] reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it."); *id.* at 597 ("[W]e do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. But . . . . the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid."); *see also Santa Fe,* 530 U.S. at 312 ("[W]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." (quoting *Lee,* 505 U.S. at 592)). The majority's objective observer – of adult age and no religious affiliation – is of no use in this context; our Establishment Clause inquiry should not be concerned with a display's effect on an individual, like a judge, who is outside the community in question and who merely "tak[es] into consideration" the effect on schoolchildren of differing religions, but, rather, we must focus upon the actual context and community in which the displays are located. *See, e.g., Santa Fe,* 530 U.S. at 308 (stating that we must consider how "the members of the listening audience" perceived the religious message). For all the foregoing reasons, I find it most appropriate to view the displays in their actual context and in consideration of the actual community that receives the message.[3]

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[3] Even if I were to consider the displays and celebrations from the perspective of a "model" reasonable student of no particular

As noted above, and in *Laurence H. Tribe, American Constitutional Law* § 14-6, at 1178 n.53 (2d ed. 1988), age has been given great weight in the Supreme Court cases involving schools. *See, e.g., Sch. Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 385 (1985) (stating that use of public funds for teaching of state-required subjects at private religious schools "may provide a crucial symbolic link between government and religion, thereby enlisting–*at least in the eyes of impressionable youngsters*–the powers of government to the support of the religious denomination operating the school") (emphasis added), *overruled on other grounds, Agostini v. Felton,* 521 U.S. 203 (1997). The Court has noted that "[t]he symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." *Id.* at 390; *Widmar v. Vincent,* 454 U.S. 263, 274 n. 14 (1981) ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.").

Furthermore, it is quite relevant here that, unlike in the public display cases, the students participate in creating the displays and in celebrating the holiday season under mandatory circumstances. As the Supreme Court stated in *Lee,* the compulsory nature of attendance "require[s] us to distinguish the public school context." 505 U.S. at 597; *see*

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religion, I would still hold that such observer, imbued with an understanding of the differing religions represented in the school as well as the history and context of the displays, would view the displays as endorsing Judaism and Islam and/or requiring participation in the celebration of Jewish and Muslim religious holidays.

also id. (contrasting the school prayer with the legislative prayer in *Marsh* and holding that "[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*"); *Sch. Dist. of Abington Twp. v. Schempp,* 374 U.S. 203, 223 (1963) (finding significant that religious activity was "prescribed as part of the curricular activities of students who are required by law to attend school" and "held in the school buildings under the supervision and with the participation of teachers employed in those schools"); *Schempp,* 374 U.S. at 252-53 (Brennan, J., concurring) (asserting that the distinction between "the voluntary attendance at college of young adults" and "the compelled attendance of young children at elementary secondary schools . . . . warrants a difference in constitutional results").

Requiring religious exercise in schools has long been found unconstitutional under the Establishment Clause. Never has the Supreme Court held, as the majority does here, that the non-educational use of religious symbols in public schools is constitutionally acceptable. In *Engel v. Vitale,* 370 U.S. 421 (1962), the Court addressed a mandate from the New York State Board of Regents directing public school students to read aloud the following daily prayer: "'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.'" *Id.* at 422. According to the Court, neither the fact that the prayer was "denominationally neutral," nor the fact that "its observance on the part of the students [was] voluntary," saved the prayer from violating the Establishment

Clause's prohibition on the use of the power and support of the government to control or influence religious beliefs. *Id.* at 430.

One year later, in *School District of Abington Township v. Schempp,* the Supreme Court found unconstitutional under the Establishment Clause a state statute "requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison." 374 U.S. at 223. The Court held that, contrary to the State's assertions, the Bible was not being used "as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects," *id.* at 224, but rather, the exercises were a religious ceremony.

In *Stone v. Graham,* 449 U.S. 39 (1980) (per curiam), the Supreme Court held that the display of the Ten Commandments on the walls of public classrooms violated the Establishment Clause. The Court found that the Kentucky statute governing such had no secular purpose, despite the State's claim to the contrary, and that "if the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments." *Id.* at 42; *see also Wallace v. Jaffree,* 472 U.S. 38, 59-60 (1985) (holding that Alabama statute requiring one-minute moment of silence for "meditation or voluntary prayer," violated the Establishment Clause insofar as it had no secular purpose).

In *Lee,* as noted above, the Court held that a commencement prayer given by a rabbi at a secondary school commencement would violate the Establishment Clause. *See id.* at 598-99. The Court noted the special danger of religious exercise sanctioned or monitored by school officials, remarking that a school official's "effort to monitor prayer

will be perceived by the students as inducing a participation they might otherwise reject." *Id.* at 590. The Court in *Lee* found "subtle coercive pressures" insofar as there was no "real alternative" for a student who wished to avoid participating or the "appearance of participation" in the commencement prayer. 505 U.S. at 588. That the school attempted to make the prayer nondenominational did not save its unconstitutionality. *See id.* at 588-89 ("The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend."); *see id.* at 590 ("Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students.").

It is without question, therefore, that the Court has been particularly vigilant in ensuring that our elementary and secondary schools not favor religion through religious exercise or otherwise. The majority concedes that the menorah and star and crescent convey a religious message, but maintains that the State may employ *some* religion in schools in light of its goal to celebrate the holiday season. However, as Justice Kennedy stated in *Lee*, "the inspiration for the Establishment Clause [is] the lesson that . . . what might begin as a tolerant expression of religious views [in public schools] may end [up] . . . put[ting] at grave risk the freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." 505 U.S. at 591-92. The Supreme Court has made clear that government action that may be permissible in the general public domain, *i.e.*,

displays in public squares, can be impermissible when it takes place in our public schools. *See, e.g., id.* at 593 ("We do not address whether [the choice between objecting to religious exercise or participating] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position."). The "context" here – elementary and secondary public schools – and the "use" of the religious symbols – *i.e.*, as "celebratory" tools – are quite significant here. *Cf. Van Orden,* 125 S.Ct. at 2869 (Breyer, J., concurring in the judgment) (noting the import of the "context" and "use" of the Ten Commandments display in Establishment Clause inquiry).

Furthermore, no student should be charged with the vast amount of specialized knowledge the majority charges to its "reasonable observer," including that "many devout Christians use crèches to commemorate the religious miracle of Christmas, [but that] these Christians and countless nonbelievers also share in the numerous secular traditions of the Christmas holiday," *ante* at **[65],** or that "the Supreme Court had approved a holiday display in which Christmas was represented by a Christmas tree and Chanukah by a menorah to convey the permissible secular message of pluralism," *id.*, or that the DOE's characterization of the star and crescent as secular resulted from its settlement of a lawsuit, *id.* at **[38 n.18].** Nor can we charge an elementary or secondary school student with the knowledge that "the public had (after *Allegheny*) increasingly come to accept the display of a menorah together with a Christmas tree as a symbol of

tolerance and freedom associated with the holiday season," *id.* at **[66 n.28].**[4]

Additionally, the majority's objection on the grounds that the record contains no "trial evidence" showing "the effect of the challenged displays on *any* child," *ante* at **[47],** is off the mark. First, the majority uses a double standard here – there is no factual evidence in the record to support *the majority's contentions* as to the effect of the display on its "adult" reasonable observer. The majority erroneously claims that it is allowed to rely on the Supreme Court's conclusions in *Allegheny,* which were based on a display with a *completely different* history, context, and community. *Ante* at **[47-48].** The rest of the "effect" evidence claimed by the majority is the same evidence on which the dissent bases its conclusions, *i.e.,* the record evidence concerning what objects are allowed in the displays. *Ante* at **[48].** Finally, the majority commits the very "error" of which it accuses the dissent – the majority speculates as to the perspective of a child where it concludes that "the religious significance of a crèche may be more obvious to the average schoolchild than that of the menorah and the star and crescent," *ante* at **[52].**

Additionally, and more importantly, this is not a purely factual issue. As Justice O'Connor stated in *Lynch,* a district court's determination of "whether a government activity communicates endorsement of religion is not a question of simple historical fact . . . . [T]he question is . . . in large part

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[4] The foregoing information *might* be imputed to the parent observer, but it is my view that, for the reasons noted above, even that parent observer, charged with such knowledge, would not unreasonably perceive the State's endorsement of Judaism and Islam and disapproval of Christianity.

a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch v. Donnelly,* 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring). Furthermore, the majority can hardly claim that such "effect" evidence is required for the *facial* challenge to the DOE's policy.

As an additional matter, I strongly disagree with the majority's characterization of the display as "cheerful" and "multicultural," *ante* at **[34],** as well as its claims that the disparate treatment given to the religions communicates a message that each of the religions is "entitled to everyone's respect," *ante* at **[62].** It can hardly be claimed that the display of two religious objects together with winter decorations suggests to a young child that the purpose of the displays was to promote understanding and respect for *the many* cultural and religious traditions celebrated in New York City during the winter holiday season. I also strongly disagree that the displays of menorahs and stars and crescents, together with kinaras and candles, merely suggest to children that different traditions use "light" to celebrate holidays. *Ante* at **[64].** Indeed, the displays suggest much more – that *some* religious groups celebrate miracles and that the winter season is significant for *these* – specially identified – religious groups. The DOE's choosing two religions to be represented in the displays hardly "permit[s] all children to feel included in some way," as the majority contends. *Ante* at **[64].** Furthermore, the majority's claim that "the defendants treated the religious and secular origins of all winter holidays . . .with equal respect," *ante* at **[61]** and its heavy reliance on the "instruction cards" in so concluding, is misplaced. *Ante* at **[53, 60-61].** These cards were only present in *one* classroom and their use is not required, if even suggested, by the DOE's holiday policy. In light of the foregoing, it is my view that an impressionable, though reasonable, student observer would view the displays'

inclusion of religious symbols of the Jewish holiday of Chanukah and the Muslim commemoration of Ramadan, in the context of a "celebration," to convey the State's approval of Judaism and Islam.

I do not mean to suggest that religious symbols may never be displayed in public schools. The display of religious symbols as part of an organized program of education about different religions and cultures would likely be found constitutional. *See Altman v. Bedford Cent. School Dist.*, 245 F.3d 49, 76 (2d Cir. 2001) ("[W]hile schools have a constitutional duty to make certain that subsidized teachers do not inculcate religion, the Establishment Clause does not prohibit schools from teaching about religion." (alteration, internal citations, and quotation marks omitted)); *see also Stone*, 449 U.S. at 42 ("This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) ("Study of religions and of the Bible from a literary and historic viewpoint, *presented objectively as part of a secular program of education*, need not collide with the First Amendment's prohibition.") (emphasis added). That educational program with its attendant discussion and presentation of the practices of multiple religions might even take place during the winter months.

The Jewish and Muslim religious symbols here, however, are not used as part of an educational program on different religions and cultures. Despite the majority's efforts to save the DOE's policy by repeatedly characterizing it as an educational program, the DOE makes clear that the policy constitutes "guidelines [that] should be followed with respect to the display of cultural/holiday symbols," Holiday Display

Memo. at 1, and that the religious symbols are used as a means to *celebrate* the secular holiday season, Appellees' Brief at 9 ("The Holiday Displays memorandum by its terms concerns seasonal displays of cultural/holiday symbols. It does not concern the subject or manner of classroom instruction."); Dahan Decl., Ex. B (statement from teacher to Skoros indicating that class would be "having a party to celebrate the holiday"). Appellees submit that any purported education comes as a residual effect of the celebration, *see* Appellees' Brief at 25 (describing the policy as proscribing the "manner of permitting the Department's multicultural body to *celebrate* the holiday season in a secular fashion and to use this *celebration* to educate the students about religions and cultures other than their own") (emphasis added); *see also Skoros v. City of New York*, No. CV-02-6439 (CPS), 2004 U.S. Dist. LEXIS 2234, at *13, *26 (E.D.N.Y. Feb. 18, 2004) (district court finding that education about holidays was in context of classroom "celebrat[ion]"); they make no claim that the displays are part of a curriculum about religion and culture. Moreover, the cards mentioned by the majority that explain the holidays and their cultural significance, *ante* at **[14-15, 53, 60-61],** were located only in one of the elementary school classrooms and appear to reflect only one schoolteacher's interpretation of the policy. Therefore, it is clear that the policy governs (and sanctions) the *celebration* of the secular holiday season within classrooms and does not constitute an educational curriculum – either formal or informal – concerning different religions and cultures. The Supreme Court has never explicitly sanctioned a public school's use of religious symbols as a means of *celebrating* the secular holiday season, as opposed to part of a program of education; even assuming such use is acceptable, the use of religious symbols of some religions and not others in such a celebration causes the endorsement problems noted above.

In sum, I find it clear that the current policy and displays violate the Establishment Clause insofar as a reasonable student observer would perceive a message of endorsement of Judaism and Islam and a reasonable parent observer would perceive a message that Judaism and Islam are favored and that Christianity is disfavored.

3. Entanglement

The endorsement problem here is exacerbated by the Holiday Display Memorandum's definition of some symbols as *per se* secular. The Memorandum defines a "Christmas tree, menorah, and star and crescent" as secular holiday decor and indicates that a display of such items is appropriate as long as the objects of one religion do not predominate the display. The DOE also concedes that it defines a crèche as a "purely religious" symbol for purposes of the Holiday Display Memorandum. In *Commack Self-Service Kosher Meats v. Weiss,* 294 F.3d 415 (2d Cir. 2002), we held (using a combined endorsement/entanglement analysis) that the State's defining "kosher" as "prepared in accordance with orthodox Hebrew religious requirements," *id.* at 423, violated the First Amendment because it suggested a "preference for the views of one branch of Judaism" over another branch, *id.* at 427. We also held that the State's involvement in determining whether foods could be labeled "kosher" constituted excessive entanglement under the Establishment Clause because it "adopted an official State position on a point of religious doctrine" and required the State to "either interpret religious doctrine or defer to the interpretations of religious officials in reaching its official position." *Id.* at 427; *see also County of Allegheny v. ACLU,* 492 U.S. 573, 593-94 (1989) (stating that "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief"); *Tribe, supra* § 14-11, at

1231 (describing "doctrinal entanglement" as reflecting the conviction that government "must never take sides on religious matters"); *Tribe, supra* § 14-11, at 1231 ("'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .'" (quoting *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943))).

It is my view that the DOE's policy risks excessive entanglement inasmuch as it "adopts an official State position on a point of religious doctrine" by defining a menorah and star and crescent as secular symbols, and a "crèche" as "purely religious." It is for this reason that I find entanglement, not for the other reasons rejected by the majority. I agree with the majority, for example, that the policy does not require the kind of constant monitoring found objectionable in *Lemon v. Kurtzman,* 403 U.S. 602, 619 (1971), that defendants "do not attempt to inject state authority into any sectarian institution," *ante* at **[69],** that the government does not "cede government authority to any religious sect or group," *id.* at **[70-71],** and that there is no "fusion of government and religious authority," *id.* at **[72].**

As noted in *Kaplan,* however, some Jews "would disagree with the apparent suggestion that a menorah itself has a significant secular import." *Kaplan v. City of Burlington,* 891 F.2d 1024, 1028-29 (2d Cir. 1989). It would not be unreasonable to assume that they would take issue with the DOE's pronouncement of a menorah as being in the same category of symbols as a Christmas tree. On the other hand, "some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity and as a cultural or national event rather than as a specifically religious event." *Allegheny,* 492 U.S. at 585 (internal quotation marks omitted). Muslims

might be similarly split as to the DOE's treatment of the star and crescent. Christians likely might take offense to the statement that a crèche is "purely religious," a contention that implicitly rejects the historical nature of the symbol. Justice Souter aptly questioned a state's competence to distinguish between the religious and secular in *Lee:*

> In many contexts . . . nonpreferentialism requires some distinction between "sectarian" religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. Simply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.

505 U.S. at 616-17 (Souter, J., concurring.).

In my view, therefore, the DOE's action in defining a menorah and star and crescent as secular, and a crèche as "purely religious," is impermissible insofar it takes positions on divisive religious issues. I concede that the balancing necessary to ensure that a public holiday display conveys an overall secular message necessarily requires government officials to determine the degree to which certain symbols are secular or religious. Thus, even if the DOE's policy did not define which objects are secular and which are religious, some official would have to make that determination in connection with the displays. That notwithstanding, it is my view that pronouncement of certain symbols to be *per se* secular is *excessive* entanglement, which is proscribed by the Establishment Clause. *See Agostini v. Felton,* 521 U.S. 203, 233 (1997) ("Interaction between church and state is

inevitable and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." (internal citation omitted)).

Moreover, the DOE's policy does not affect only government speech, as the majority contends, *ante* at **[67]**. Rather, it governs the conduct of children and parents -- it dictates what symbols the public schoolchildren may draw or otherwise create for use in the displays, as well as what objects parents may send with their children for use in the displays. To this extent it does "dictate to a[] private group or person . . . an[] official view of what are the secular or religious symbols of particular holidays," *ante* at **[69]**. Moreover, the fact that it does so "exclusively within public schools" does not save its unconstitutionality, *ante* at **[69]**. Each of the symbols at issue relates to commemorations of significant faith-based events and the DOE dictates to teachers, parents, children, and others within the relevant community which symbols used in such commemorations are "religious" and which are "secular."

II. Free Exercise and Parental Rights Claims

I concur in the majority's holdings as to Skoros's Free Exercise and parental rights claims. I find those claims to be without merit for reasons similar to those stated by the majority and the District Court. Though I find that the displays and policy violate the Establishment Clause, the record in this case does not demonstrate that the holiday displays or policy "placed a substantial burden" on the Skoros children's ability to practice their faith, *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 79 (2d Cir. 2001), nor does the record demonstrate that the displays or policy substantially

burdened Skoros's ability to control the religious or general upbringing and education of her children.

IV. Conclusion

For the foregoing reasons, I concur in the majority's affirmance of the District Court's rejection of Skoros's Free Exercise and parental rights claims. I respectfully dissent from the majority's opinion on the Establishment Clause claim and would vacate and reverse the judgment of the District Court in that respect.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CV-02-6439 (CPS)

[Filed February 20, 2004]

ANDREA SKOROS, individually, and as next friend of Nicholas and Christos Tine, Plaintiffs,	)
- against -	)
CITY OF NEW YORK et alia, Defendants.	)

JUDGMENT

A Memorandum and Order of Honorable Charles P. Sifton, United States District Judge, having been filed on February 18, 2004, dismissing the complaint; and directing the Clerk of Courts to enter judgment in favor of the defendants on all counts: it is

ORDERED and ADJUDGED that plaintiffs take nothing of the defendants; that the complaint is dismissed; and that

judgment is hereby entered in favor of the defendants on all counts.

/s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

Dated: Brooklyn, New York
February 19, 2004

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CV-02-6439 (CPS)

[Filed February 18, 2004]

Andrea Skoros, individually, and as next friend of Nicholas and Christos Tine, Plaintiffs,	)
- against -	)
City of New York *et alia*, Defendants.	)

MEMORANDUM DECISION AND ORDER

SIFTON, Senior Judge.

This is a civil rights action brought under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 challenging the holiday displays policy of the New York City public schools. The action is brought by Andrea Skoros individually and as next friend of Nicholas and Christos Tine, her minor sons. Defendants include the City of New York (the "City"), Joel I. Klein, in his official capacity as Chancellor of the New York City Department of Education

("DOE"), and Sonya Lupion, individually and in her official capacity as principal of the Edith K. Bergtraum School. Plaintiffs seek declaratory and injunctive relief and damages.

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, which authorizes jurisdiction over civil actions arising under federal law, and 28 U.S.C. § 1343(a)(3), which authorizes jurisdiction over civil actions arising under 42 U.S.C. § 1983. Both sides initially cross-moved for summary judgment, and the plaintiffs moved in the alternative for a preliminary injunction. On December 4, 2003, the parties appeared before the undersigned and agreed to withdraw their motions for summary judgment and to present the matter to the Court for decision as a bench trial on the basis of the papers previously submitted in connection with the cross-motions, supplemented by any additional documentary or testimonial evidence either side might choose to present.[1] I thereupon ordered a consolidation of the preliminary injunction hearing with the bench trial, pursuant to Rule 65 of the Federal Rules of Civil Procedure,[2] and on December 16, 2003, the matter was taken on submission. For the following reasons, I conclude that the New York City DOE holiday displays policy does not violate the United States Constitution, and the complaint is, accordingly, dismissed. What follows sets forth the findings of fact and conclusions of law on which this determination is based, as

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[1] Plaintiffs' counsel, Robert J. Muise, joined by telephone.

[2] Rule 65(a)(2) states, in relevant part: "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Fed. R. Civ. P. 65(a)(2).

required by Rule 52(a) of the Federal Rules of Civil Procedure.

FACTS

Plaintiff Andrea Skoros is, as mentioned, the mother of Christos and Nicholas Tine. Skoros is Roman Catholic and is raising her sons in the Roman Catholic faith. During the 2001/2002 school year, Nicholas was a third-grade student in New York City Public School 165, the Edith K. Bergtraum School ("P.S. 165"), where defendant Sonya Lupion was and continues to be principal. The following year, Nicholas attended fourth grade at P.S. 169. During the 2002/2003 school year, Christos attended second grade at P.S. 184. Currently, Christos is in the third-grade class at P.S. 184, and Nicholas is in the fifth-grade class at P.S. 169.

In November 2001, the General Counsel to the Chancellor of the DOE issued a memorandum to all DOE superintendents and principals regarding holiday displays (the "Holiday Displays memorandum"). The Holiday Displays memorandum sets forth guidelines for school officials to follow with respect to the display of holiday, cultural, and seasonal symbols in the New York City public schools. The November 2001 memorandum, which was redistributed unchanged in November 2002, states:

> New York City is a diverse multi-cultural community. It is our responsibility as educators to foster mutual understanding and respect for the many beliefs and customs stemming from our community's religious, racial, ethnic and cultural heritage. In furtherance of this goal, we must be cognizant of and sensitive to the special significance of seasonal observances and religious holidays. At the same time, we must be

> mindful that the Constitution prohibits a school system from endorsing or promoting a particular religion or belief system.

The memorandum provides the following guidelines concerning the display of cultural and holiday symbols:

1. The display of secular holiday symbol decorations is permitted. Such symbols include, but are not limited to, Christmas trees, Menorahs, and the Star and Crescent.

2. Holiday displays shall not appear to promote or celebrate any single religion or holiday. Therefore, any symbol or decoration which may be used must be displayed simultaneously with other symbols or decorations reflecting different beliefs or customs.

3. All holiday displays should be temporary in nature.

4. The primary purpose of all displays shall be to promote the goal of fostering understanding and respect for the rights of all individuals regarding their beliefs, values and customs.

(Joint Stip. of Facts, Exs. 1, 2) (emphasis in original).[3]

During both the 2001/2002 and 2002/2003 school years, representatives from the Catholic League for Religious and Civil Rights requested that school officials in the DOE allow

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[3] The guidelines in their current form were developed in 1997 by the DOE's Office of Legal Services in conjunction with the Office of the Corporation Counsel. (*See* Vignola Decl. ¶ 13.)

the inclusion of a creche[4] in the school seasonal displays. School officials denied the request, pursuant to the Holiday Displays memorandum. (*See* Joint Stip. of Facts, Exs. 7-15; Skoros Decl. ¶ 8.) In addition, in December 2002 Ms. Skoros inquired by letter to Christos' teacher what religious symbols the children would be coloring for Christmas. (*See* Skoros Supp. Decl. ¶ 3; Dahan Decl. ¶¶ 10-11, Ex. B.) Christos' teacher, Mrs. Dahan, replied by describing the different Christmas symbols the children had been working on, indicated they would be having a party to celebrate the holiday, and included a copy of the DOE Holiday Displays memorandum. (*See id.*)

Both sides agree that, as interpreted and implemented by the DOE, the Holiday Displays memorandum does not permit the public display of the creche by school officials alone or as part of a school-authorized holiday or seasonal display in the public schools within the DOE. (*See* Joint Stip. of Facts ¶ 13.) The holidays to which the DOE memorandum applies include Ramadan, Chanukah, Kwanzaa, and Christmas, which coincide more or less with the winter solstice and with a winter vacation during which the public schools are closed.

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[4] Although the parties use the terms "creche" and "nativity scene" interchangeably, this opinion will refer to the creche, defined as "a representation of the stable at Bethlehem with the infant Jesus surrounded by Mary, Joseph, the oxen and asses, and adoring shepherds and magi." *Webster's Third New International Dictionary of the English Language Unabridged*, Merriam-Webster, Inc. (1993); *see The Oxford American Dictionary and Language Guide*, Oxford University Press (1999) (defining creche as "a representation of a Nativity scene" and Nativity as "the birth of Christ . . . the festival of Christ's birth; Christmas").

The parties jointly stipulate that the holiday display in the lobby of P.S. 165 in 2001 included a menorah, Christmas tree, star and crescent, and other holiday symbols. (*See* Joint Stip. of Facts ¶ 22.) The pictures of the display in P.S. 184 in 2002, provided in the joint stipulation of facts, show the front entrance holiday display including a festively decorated Christmas tree and a table adjacent to the tree with several dreidels[5] and three paper menorahs, one with a sign stating "Happy Hanukah." (*See* Joint Stip. of Facts, Exs. 16, 19.) In addition, five dreidels and two kinaras[6] apparently drawn by students are displayed on the walls next to the Christmas tree. (*See id.*) Pictures of the back entrance to P.S. 184 depict student artwork affixed to the walls, including two snowflakes, six Christmas wreaths with student written work, four dreidels, and one menorah. (*See id.*, Exs. 17, 18, 20.) Pictures of Christos' classroom in P.S. 184 in December 2002 show a calendar representing the month of December with snowmen, Christmas trees, dreidels, and Santa in his sleigh pulled by reindeers. (*See id.*, Ex. 21.) Hanging by clothespins from a line strung across the classroom are student-created, three-dimensional paper Christmas wreaths and dreidels and at least one drawing of a kinara. (*See id.*, Exs. 21, 22, 25, 26.) Affixed to tables and chairs in the classroom are student-created stockings, with a name on each, presumably the students' names. (*See id.*, Exs. 23, 24.) There is also a paper wreath made of alternating snowmen and Christmas trees topped with the Star of Bethlehem affixed to a wall, as well

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[5] A dreidel is a four-sided top used in a children's game traditionally played during Chanukah. *See* Random House Dictionary (unabridged 1973 ed).

[6] A kinara is a seven-branched candelabra lighted during Kwanzaa celebrations. *See* The New Encyclopedia Britannica, (15th ed. vol. 7, at 54-55).

as a display of snowmen under "A Winter Wonderland" sign. (*See id.*, Exs. 23, 24, 27.)

The joint stipulation of facts also includes pictures of the holiday images present in the hallways, classrooms, and the administrative office of P.S. 169 in December 2002. Thirteen photographs of the holiday symbols displayed around P.S. 169 are included, displaying the festive nature of the holiday display, not to mention the creative flare of the students, teachers, and administrators. Included among the imagery are reindeers made from small brown bags beneath a "Songs, Symbol, Signs of the Season" sign; three-dimensional paper dreidels; Christmas trees topped with the Star of Bethlehem, candles, snowmen, stars, paper and stuffed teddy bears surrounding a card describing a book entitled "The Chanukah Guest"; paper menorahs, paper Christmas trees, decorated paper Christmas wreaths and bells, drawings of Kwanzaa kinaras, gingerbread men cutouts surrounding a book entitled "The Gingerbread Baby," and a Christmas tree made of cutout hand tracings colored green and covered with Christmas decorations; a table-top artificial Christmas tree next to an electric menorah; images of Santa Claus; candy canes, more paperbag reindeer with cards inscribed with the verses to "Rudolph the Red-Nosed Reindeer"; a snowman atop a mound of packages wrapped as Christmas presents; cotton-ball snowmen; a sign reading "Happy Holidays" and another reading "Let it Snow." (*See id.*, Exs. 28-40.) In addition, a bulletin board in Nicholas' classroom displayed cards describing Kwanzaa, Christmas, Ramadan, and Chanukah. (*See* Homer Decl. ¶ 4.) Ramadan is described in one card as follows:

> Ramadan, the ninth month of the Muslim calendar, is a holy month for Muslims, believers in the religion Islam. During Ramadan, Muslims fast (take no food

> or drink) from dawn to sunset. It is a very spiritual time for Muslims. They arise early for a pre-dawn meal. At the end of the day, the fast is broken by taking the *Iftar* meal, often with friends or family invited into one another's homes. When the new moon appears and the month of Ramadan is over, Muslims celebrate a joyous holiday called *Eid-ul-Fitr* (Festival of Fast-Breaking). They dress in their best clothing for prayers at the mosque and celebrate with family and friends.

(Homer Decl., Ex. A.) The Chanukah card states:

> Hanukkah is celebrated by Jews in remembrance of a great victory, which won them the right to practice their religion. Also called the Festival of Lights, Hanukkah lasts for eight days because the oil in the Hanukkah story lasted that long. Candles are lit each evening during the eight days of Hanukkah. The candle holder is called a *menorah*. It holds eight candles and one servant candle, which is used to light the others-one more candle each night of Hanukkah. Some children receive gifts on each of the eight nights of Hanukkah. They play *dreidel* games and enjoy special Hanukkah foods.

(Homer Decl., Ex. A.) The card describing Kwanzaa states:

> Kwanzaa is the holiday when African Americans celebrate their cultural heritage. It was created in 1966 by Dr. Maulana Karenga, an African who wanted his people to have a special time to celebrate and learn about their cultural origins. Kwanzaa is celebrated from December 26 through January 1. Families and friends gather to remember their ancestors and to

> enjoy African music, dancing, poetry, and foods. The holiday has seven days, seven symbols, and seven principles. The principles correspond to the seven days of the celebration and serve as guides for daily living.

(Homer Decl., Ex. A.) The Christmas card states:

> Christmas, December 25, is the Christian holiday that celebrates the birth of Jesus Christ. This holy time is marked by Nativity scenes, caroling, and church services where Christians hear again the story of the birth of the baby Jesus. Christmas includes many festive customs such as decorating homes and evergreen trees with colored lights, bright ribbons, and shining ornaments. People hang stockings by the fireplace, send Christmas cards to friends near and far, and wrap carefully chosen gifts for their loved ones. The jolly figure of Santa Claus is the bringer of gifts in this happy season.

(Homer Decl., Ex. A.)

Plaintiffs further allege that, during the winter holiday season, Nicholas and Christos were "directed" to make menorahs and thereby "directed to engage in a sort of mock religious practice of Jews." (Pls. Brief at 27-28; *see* Skoros Decl. ¶ 10; Skoros Supp. Decl. ¶ 2.) Plaintiffs also allege that Nicholas was taught about the story of Chanukah and its origin but not about Christmas and its origin. (*See* Skoros Decl. ¶ 10; Skoros Supp. Decl. ¶ 4.) However, based on all of the evidence submitted concerning the implementation of the holiday displays policy at Nicholas' and Christos' schools including the declarations of Nicholas' and Christos' teachers, I conclude that the Tine children were not in fact "directed"

to make menorahs and voluntarily colored menorahs as part of their seasonal art projects. (*See* Baumgardt Decl. ¶ 3; Crawley-Soliman Decl. ¶ 3; Homer Decl. ¶¶ 3-7; Dahan Decl. ¶¶ 4-8; Pantelis Decl. ¶¶ 3-6.) In addition, I conclude on the same basis that, in the creation of such holiday displays, the children were taught about the origins of each of the holidays celebrated, including Kwanzaa, Chanukah, Ramadan, and Christmas. (*See* Homer Decl. ¶¶ 3-7; Dahan Decl. ¶¶ 4-8.)

CONTENTIONS

Plaintiffs allege that the DOE's policy regarding holiday displays in the public schools on its face and as applied violates the Establishment Clause, plaintiffs' right to free exercise of religion, and plaintiff Skoros' right to control the religious upbringing and education of her children. Plaintiffs contend that the menorah and the star and crescent are religious symbols and that their inclusion, absent the inclusion of the creche, impermissibly endorses Judaism and Islam at the expense of Christianity. In addition, plaintiff Skoros contends that her children, both minor students in the New York City public schools, when provided with coloring books including the story of Chanukah and the image of a menorah and when exposed to the holiday displays in the entrances, hallways, and classrooms of their schools, were coerced to accept Judaism and Islam at the expense of their Catholic beliefs.

In response, defendants argue that the DOE guidelines concerning holiday displays do not promote any religion but rather serve the secular, educational purpose of promoting cultural understanding. Specifically, the City takes the position that the menorah and star and crescent are holiday symbols with secular dimensions which, when displayed with

other secular symbols of the holidays, serve the secular educational purpose of promoting cultural understanding while avoiding the promotion or endorsement of any particular religious faith. The creche, the City argues, is a religious symbol, the inclusion of which would, under all the circumstances, bring about exactly the kind of constitutional harms that plaintiffs seek to prevent.

ESTABLISHMENT CLAUSE CLAIM

Establishment Clause law in the Supreme Court with respect to government-sponsored displays of religious symbols may perhaps best be described as an on-going evolutionary process of fitting recognized precedents to developing factual situations presented by an increasingly diverse society.

Opinions of one or more of the Supreme Court Justices have, from time to time, announced the demise of such precedents as *Lemon v. Kurtzman,* 403 U.S. 602 (1971), *see, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 396-401 (1993) (Scalia, J., concurring), and voiced the not unusual appellate judges' complaint about tests that rely on trial court fact-finding, predicting that the absence of a comprehensive one-size-fits-all test will produce "a jurisprudence of minutiae," relying on "little more than intuition and a tape measure." *E.g., County of Allegheny v. Greater Pittsburgh ACLU,* 492 U.S. 573 (1989) (Kennedy, J., concurring and dissenting).

In fact, *Lemon* and its progeny, as even their critics acknowledge, have proven resilient, *see Lamb's Chapel,* 508 U.S. at 398-99, and provide a framework within which the resolution of this case is not that difficult. The problem is not the inadequacy of the Supreme Court's articulated standards

for deciding cases such as these. The problem, if problem it is, is that contemporary society is, for better or worse, experiencing exposure to an expanding variety of cultures and religions.

Lemon held that, in determining whether a governmental action violates the Establishment Clause, courts must consider: (1) whether the challenged practice has a secular purpose; (2) whether the practice either advances or inhibits religion in its principal or primary effect; and (3) whether the practice fosters excessive government entanglement with religion. *Lemon,* 403 U.S. at 612-13. Although *Lemon* still governs facial challenges to government policy, the second prong has evolved into an independent test for challenges to government-sponsored policies regarding displays of religious symbols as they are applied in particular situations.

In *Lynch v. Donnelly,* 465 U.S. 668 (1984), the Court confronted a city-sponsored display in a private park that included a creche, Santa Claus, Christmas tree, carolers, and a banner proclaiming "Seasons Greetings." Justice O'Connor, elaborating on the second prong of *Lemon* and developing what has become known as the endorsement test, found the display permissible, recognizing that a public Christmas display of both secular and religious symbols of Christmas in the context of the holiday itself does no more than serve the secular purpose of recognizing the national holiday. *Lynch,* 465 U.S. at 688 (O'Connor, J., concurring). The majority in *Lynch* had no problem permitting the display since the context made clear that no religious endorsement by the government was intended. *Lynch,* 465 U.S. 671, 680, 687.

In *Allegheny,* the Court confronted two different displays: one, a government-sponsored display of a menorah together with a Christmas tree, *Allegheny,* 492 U.S. at 581-82, 587;

the other, a free-standing creche on the courthouse steps, *id.* at 579-82. The two situations were distinguished by the Court in a manner with direct relevance to this case. A plurality of the Court held that the menorah and Christmas tree display did not offend the Establishment Clause because of the overriding secular purpose of recognizing the diversity of religious holidays during the winter season and the consequential lack of coercion. *Id.* at 613-20 (Blackmun, J.), 632-38 (O'Connor, J.), 663 (Kennedy, J., joined by Rehnquist, C.J., White, J., Scalia, J.). At the same time, a plurality struck down the free-standing creche because nothing in the context of the display neutralized its distinctively religious nature. *Id.* at 598-603 (Blackmun, J., joined by Brennan, J., Stevens, J., Marshall, J., O'Connor, J.).

Facial Challenge to DOE Policy

The court of appeals for this Circuit recognizes the continued relevance of the *Lemon* test for the resolution of a facial challenge on Establishment Clause grounds. *See Commack Self-Service Kosher Meats Inc. v. Weiss,* 294 F.3d 415, 425 (2d Cir. 2002) ("As the Supreme Court has recently reiterated, in cases involving facial challenges on Establishment Clause grounds, we assess the constitutionality of an enactment by reference to the three factors first articulated in Lemon.") (quoting *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290, 314 (2000)) (internal quotation marks and citations omitted). In *Commack* the court of appeals reminded us that "the *Lemon* factors require that a challenged law (1) have a valid secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion." *Id.* (citing *Lemon,* 403 U.S. at 612-13). Based on a *Lemon* analysis, I conclude that the DOE has succeeded in designing

a policy[7] sensitive to the variety of cultural, religious, and ethnic backgrounds of New York City public school students, and one that passes constitutional muster.[8]

Secular Purpose

The first step of the facial analysis is to determine if the DOE holiday display policy has an unconstitutional purpose. "Under the *Lemon* Standard, a court must invalidate a [state policy] if it lacks a secular legislative purpose." *Santa Fe,* 530 U.S. at 314 (quoting Lemon, 403 U.S. at 612). "Governmental action will only be found to lack a secular purpose where 'there [is] no question that the statute or activity was motivated wholly by religious considerations.'" *Commack,* 294 F.3d at 431 (quoting Lynch, 465 U.S. at 680).

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[7] The City objects to the characterization of the Holiday Display memorandum, along with its interpretation and application, as a "policy." However, it is abundantly clear that a memorandum authored by the General Counsel to the DOE Chancellor entitled "Holiday Displays" and distributed to all superintendents and principals in the City DOE in two successive school years, establishing "guidelines" for holiday displays and relied upon in denying repeated requests to include a creche in the holiday displays, is properly considered a "policy" as required to establish liability by a municipality such as New York City under 42 U.S.C. § 1983. *See Monell v. Dept. of Social Servs.*, 436 U.S. 658, 690-91 (1978).

[8] This Court's role is simply to review the constitutionality of the policy, not re-write it. *See Marchi v. Board of Cooperative Educational Services of Albany,* 173 F.3d 469, 476 (2d Cir. 1999) ("when government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway").

The Holiday Display memorandum states that the "primary purpose of all displays shall be to promote the goal of fostering understanding and respect for the rights of all individuals regarding their beliefs, values and customs." (Joint Stip. of Facts, Exs. 1, 2.) Consistent with that purpose, the memorandum dictates that "holiday displays shall not appear to promote or celebrate any single religion or holiday." (*Id.*) Specifically, the memorandum states that "any symbol or decoration which may be used must be displayed simultaneously with other symbols or decorations reflecting different beliefs or customs." (*Id.*) The text of the memorandum notes that it is the educator's responsibility "to foster mutual understanding and respect for the many beliefs and customs stemming from our community's religious, racial, ethnic and cultural heritage" and that "the Constitution prohibits a school system from endorsing or promoting a particular religion or belief system." (*Id.*) Accordingly, I find that the DOE holiday display policy, by its terms, states a secular purpose.

The DOE's stated secular purpose is entitled to deference, but nonetheless, a court's duty is to "distinguish a sham secular purpose from a sincere one." *Santa Fe,* 530 U.S. at 308 (quoting *Wallace v. Jaffree,* 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in judgment)). This inquiry involves an examination of the circumstances surrounding the development of the policy. *See Santa Fe,* 530 U.S. at 315. Such an inquiry depends on "judicial interpretation of social facts" and the "unique circumstances" surrounding the adoption of the DOE holiday display policy. *See Sante Fe Independent School Dist.,* 530 U.S. at 315 (quoting *Lynch,* 465 U.S. at 693-94 (O'Connor, J., concurring)).

Plaintiffs argue that, despite its stated purpose, "by purposefully excluding the Christian Nativity scene or creche,

[the DOE] policy actually narrows or reduces understanding and respect." (Pls. Brief at 23.) Specifically, plaintiffs allege that the true purpose of the DOE holiday display policy "is to promote and endorse observance of Jewish and Islamic religious holidays and seasonal observances and to secularize Christian religious holidays and seasonal observances, in particular, the Christian holiday and seasonal observance of Christmas." (Am. Compl. ¶ 14.) However, there is simply no evidence sufficient to establish such an insidious purpose on the part of the DOE. The DOE decided to include the star and crescent among the permitted symbols with secular dimensions at least in part in response to litigation brought by the Secretary-General for the National Council on Islamic Affairs. (*See* Vignola Decl. ¶ 22.) The only evidence as to the reason for the inclusion of the menorah is that the DOE's holiday display policy was formulated after consultation with lawyers, DOE's counsel, and the Corporation Counsel of the City of New York, with an eye towards parity and a concern that the holiday displays do not promote or celebrate any single religion or holiday. (*See* Joint Stip. of Facts, Exs. 9, 13.)

It bears noting in this context that, despite the growing diversity of this country, it is still by and large Christian. (*See* Grumet Opp. Decl., Ex. A, *Religious Expression at Christmastime: Guidelines of the Catholic League, Christmas 2003* (noting that 86% of Americans identify themselves as Christian).) Without a diversity policy a winter holiday display in New York City's public schools would be dominated by images representative of Christmas, as is true in most residential and commercial areas of the City. Efforts to inject variety into the winter holiday season have had the beneficial consequence of making both Chanukah and Ramadan more familiar to the public. *See Allegheny*, 492 U.S. at 586-87 (Blackmun, J., joined by Stevens and

O'Connor, JJ.). Potential sources of social divisiveness have been lessened or accommodated without undermining the religious message of each of the religions affected. It is now customary for Jewish children to receive Chanukah presents, a practice that has developed in parallel with the giving of Christmas presents.[9] *See id.;* (Grumet Opp. Decl., Ex. E, Louis Jacobs, "Hanukkah," Encyclopedia of Religion, V.6 at 193 (Mircea Eliade, ed. 1987)). Similarly, Ramadan has adopted some of the non-religious practices traditionally associated with the celebration of Christmas. This year, for example, Hallmark Cards introduced greeting cards celebrating Eid al-Fitr (*see* Muslim *market gets new emphasis; Ramadan cards, dolls hot sellers, Chicago Tribune,* Nov. 23, 2003; Teresa Watanabe, *Los Angeles Times,* Nov. 1, 2003; Jason Derose, *Marketplace Morning Report,* Minnesota Public Radio, Nov. 24, 2003), and the Postal Service expects to sell 44 million Eid stamps this year (up from 35 million printed in 2002) as part of its Holiday Celebration series. (*See Muslim market gets new emphasis; Ramadan cards, dolls hot sellers, Chicago Tribune,* Nov. 23, 2003.) The placement of Kwanzaa during the winter holiday season, while not government sponsored, is nevertheless an effort to inject another secular alternative into an otherwise highly religious season. The DOE policy, permitting the inclusion of symbols of Kwanzaa, Chanukah, and Ramadan in addition to Christmas, is thus an attempt to diversify the season so that children who do not celebrate Christmas can participate in the seasonal celebration and can learn about cultures different from their own without trespassing on their own religious

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[9] Gift-giving for Christians is rooted in the story of the birth of Baby Jesus, when the Magi came to Bethlehem bearing gifts.

beliefs. It is clear that the DOE policy is simply an attempt to diversify the season and provide non-Christian holidays with parity in the school-sponsored holiday displays.

By emphasizing secular aspects of the Christmas holiday alongside secular aspects of other belief systems involved, the City does not discriminate against Christians. *See Allegheny*, 492 U.S. at 610-11. The Supreme Court in *Allegheny* explicitly rejected this notion and explained the difference between secular and religious celebration of Christmas:

> Celebrating Christmas as a religious, as opposed to a secular holiday, necessarily entails professing, proclaiming, or believing that Jesus of Nazareth, born in a manger in Bethlehem, is the Christ, the Messiah. If the government celebrates Christmas as a religious holiday . . . it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief. In contrast, confining the government's own celebration of Christmas to the holidays' secular aspects does not favor the religious beliefs of non-Christians over those of Christians. Rather, it simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs, an allegiance that would truly favor Christians over non-Christians.

Allegheny, 492 U.S. at 611-12. Accordingly, plaintiffs' allegation that the DOE's holiday display policy's purpose is to secularize Christmas by including secular symbols but not religious symbols is without merit. The DOE holiday display policy is valid in its purpose and on its face as a neutral accommodation of the multiculturalism of New York City's public school children which protects minority views and

adequately safeguards a diversity of religious and non-religious beliefs.

Primary Effect

The second prong of the *Lemon* test requires a court to determine whether the "principal or primary effect" of the policy advances or inhibits religion. *Commack*, 294 F.3d at 430 (quoting Lemon, 465 U.S. at 612). "[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995)[10] (O'Connor, J., concurring in part and concurring in judgment). However, laws that merely have an "indirect, remote or incidental benefit upon religion," *Lynch*, 465 U.S. at 683, do not advance religion in violation of the Establishment Clause. *Commack*, 294 F.3d at 430. Accordingly, "when courts adjudicate claims that some governmental activity violates the Establishment Clause, they must be careful not to invalidate activity that has a primary secular purpose and effect and only incidental religious significance." *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469, 476 (2d Cir. 1999)

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[10] In *Capital Square*, a plurality of the Court found that the endorsement test did not apply to private religious displays in traditional public forums, but nearly all of the Justices agreed that the test should apply to government-sponsored religious expression. *See Capitol Square Review & Advisory Bd.*, 515 U.S. at 764-66 (Scalia, J., with Rehnquist, C.J., Kennedy and Thomas, JJ., concurring); *id.* at 785-88 (Souter, J., with O'Connor and Breyer, JJ., concurring); *id.* at 797-99 (Stevens, J., dissenting).

Courts are required to be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools" because "families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the students and his or her family." *Edwards v. Aguillard,* 482 U.S. 578, 583-84 (1987). In addition, the heightened scrutiny is required because "students are impressionable and their attendance is involuntary." *Edwards,* 482 U.S. at 583-84.

In this case, the text of the policy permits the inclusion of a menorah and a star and crescent among other secular symbols in school holiday displays. Accordingly, one crucial question is whether the DOE policy conveys or attempts to convey the message that children should embrace Judaism and Islam. *See Wallace,* 472 U.S. at 73-74. Absent a demonstration of City endorsement of a particular set of religious beliefs, the display of symbols with religious dimensions in connection with a legitimate secular purpose, i.e., the celebration of multiple winter holidays, is simply an acknowledgment of the holidays without expressing allegiance to particular religious beliefs or religion over non-religion. *See Allegheny,* 492 U.S. at 611-12. The question cannot, however, be answered in the abstract but, instead, requires the Court to consider whether an objective observer, acquainted with the history, language, and administration of the holiday display policy, would perceive it as an endorsement of religion. *Santa Fe,* 530 U.S. at 309; *see also Wallace v. Jaffree,* 472 U.S. 38, 73-74 (1985) (O'Connor, J., concurring in part and concurring in judgment); *Lynch,* 465 U.S. at 694 (concurring opinion) ("Every government practice must be judged in its unique circumstances to

determine whether it constitutes an endorsement or disapproval of religion").

The principal effect of the DOE holiday display policy and its interpretation is the advancement of its secular purpose. The holiday display policy allows the presentation of symbols that, although perhaps religious in origin, have developed significant secular connotations. The symbols are used as teaching aids or resources to foster understanding and respect and are presented as part of a larger display of cultural symbols of the winter holidays that is temporary in nature. Because all symbols must have significant secular dimensions and must be presented in a prudent and objective manner as a teaching aid, the advancement of a secular program of education, and not of religion, is the primary effect of the policy and its interpretation.

This prong of the *Lemon* test also forbids governmental conduct whose primary effect is to inhibit religion. Lemon, 403 U.S. at 612. A "practice that plainly embodies an intentional discrimination among religions must be closely fitted to a compelling state purpose in order to survive constitutional challenge." *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring, n.1). As evidenced by the text of the policy, which suggests the inclusion of a Christmas tree as well as a menorah and a star and crescent, the DOE holiday display policy does not "plainly embody an intentional discrimination among religions." *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring, n.1). However, even practices that *suggest* a denominational preference require strict scrutiny. *See Allegheny*, 492 U.S. at 608-09. Plaintiffs argue that a policy which allows for Jewish and Muslim symbols with religious dimensions but excludes the creche, a Christian symbol with

religious dimensions, suggests an impermissible hostility towards Christianity.[11] This argument fails for two reasons.

First, despite plaintiffs' argument to the contrary, the holiday display policy does in fact allow for Christmas symbols with religious dimensions.[12] The text of the policy itself suggests the inclusion of a Christmas tree topped with the Star of Bethlehem. (*See* Joint Stip. of Facts, Exs. 23, 27, 28, 30.) A Christmas tree, even one without the Star of Bethlehem, has religious connotations in addition to secular connotations. *See Sechler v. State College Area Sch. Dist., 121,* F. Supp. 2d 439, 451 (M.D. Pa. 2000) ("the Christmas tree (despite being called a "Giving Tree") and the doves plainly have religious connotations in addition to their secular meaning"); *Chabad-Lubavitch of Georgia v. Harris,* 752 F. Supp. 1063, 1068 (N.D. Ga. 1990) ("the Christmas tree is a mixed secular-and-religious symbol"); (Grumet Opp. Decl., Ex. A, *Religious Expression at Christmastime: Guidelines of the Catholic League, Christmas 2003* (noting that a Christmas tree in a public school is among the symbols "viewed as secular or religious depending on the context")). The

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[11] Plaintiffs also argue that the creche should be included because it too has secular dimensions, namely, a celebration of the historical birth of Jesus. This argument is frivolous. While the birthdays of historically significant figures are regularly celebrated in this country, it is not a practice to celebrate such anniversaries with a depiction of their birth. The celebration of Christ's nativity in the form of the creche is what it is, a religiously oriented evocation of the miracle of Christ's birth, a central tenet of Christian beliefs.

[12] Indeed, the card describing the Christmas holiday in Nicholas' classroom refers to "Nativity Scenes" as one of the symbols marking "this holy tune." (Homer Decl., Ex. A.)

Christmas tree, as evidenced by its name, does not derive from the Jewish or Islamic faiths but, like Christmas stockings and Christmas wreaths, is a product of the celebration of the birth of Jesus. It is also clear that the religious origins of Christmas will be explored during the creation and observation of these holiday displays. This is evidenced by the Christmas card displayed on the bulletin board in Ms. Homer's fourth-grade class. (*See* Homer Decl., Ex. A.) The card describing Christmas, posted alongside cards describing Chanukah, Ramadan, and Kwanzaa, describes Christmas as "the Christian holiday that celebrates the birth of Jesus Christ." (Homer Decl., Ex. A.)

Even if a holiday display were devoid of a Christian religious symbol apart from the Christmas tree, the display would not be in violation of the Establishment Clause. Implicit in the *Allegheny* holding is a recognition that an explicit Christian religious symbol such as a creche need not be included in a Christmas time display to counterbalance the display of a menorah before the message is reasonably perceived as one of inclusion. *See Allegheny*, 492 U.S. 573 (1989) (upholding the constitutionality of a display including a Christmas tree, a menorah and a "salute to liberty" sign).

Second, the policy does not single out the creche but, rather, distinguishes between symbols with secular dimensions that are permissible and "purely religious" symbols that are not permissible. (*See Defs.* Brief at 12.) "[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." *Good News Club v. Milford Central School*, 533 U.S. 98, 114 (2001); *see Parents Association of P.S. 16 v. Quinones*, 803 F.2d 1235, 1240 (2d Cir. 1986). "The rationale behind the requirement of neutrality is, in part, that governmental actions giving even the appearance of favoring

one religion over another are likely to cause divisiveness and disrespect for government by those who hold contrary beliefs." *See Quinones,* 803 F.2d at 1240. "The concern for neutrality is nowhere more important than in education programs, for the government's activities in this area can have a magnified impact on impressionable young minds, providing a crucial symbolic link between government and religion, thereby enlisting — at least in the eyes of impressionable youngsters — the powers of government to the support of the religious denomination." *Quinones,* 803 F.2d at 1240 (quoting *Grand Rapids School Dist. v. Ball,* 473 U.S. 373 (1985)) (internal quotation marks omitted).

As interpreted, the policy prohibits not just the creche, but anything considered purely religious, including excerpts from religious text such as the Torah or the Qur'an, scenes of worship, objects of worship, illustrations of deities or religious figures like Muhammad, and illustrations of religious events. (*See* Vignola Decl. ¶ 16.) Mr. Vignola explains that these displays are prohibited because of a concern that their display would violate the Establishment Clause. (*See* Vignola Decl. ¶ 16.) In addition, Mr. Vignola explains that "holiday displays raise a particular concern because they may be seen by students outside the immediate context of classroom instruction" and therefore pose "a greater risk" of "being perceived as endorsing religion." (*See* Vignola Decl. ¶ 15.) Because the DOE "has a strong, perhaps compelling, interest in avoiding Establishment Clause violations," *see Lamb's Chapel,* 508 U.S. at 394, it may proscribe activities that risk giving the impression that the school endorses religion." *Marchi,* 173 F.3d at 477.

As the Eighth Circuit Court of Appeals has noted, "it would be literally impossible to develop a public school curriculum that did not in some way affect the religious or

nonreligious sensibilities of some of the students or their parents." *Florey v. Sioux Falls School Dist.*, 619 F.2d 1311, 1317 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980). However, the DOE "need only ensure that the primary effect of the school's policy is secular." *Id.*

In this case, the DOE has succeeded. Exclusion of the creche from holiday displays is not discriminatory or hostile towards Christianity but, rather, serves the holiday display policy's secular purpose. By excluding purely religious symbols of all faiths, the policy avoids the appearance of endorsing any one religion and, instead, has the primary secular effect of celebrating the diversity of the winter holiday season.

Entanglement

The third prong of the *Lemon* test demands that government policy not "foster an excessive . . . entanglement with religion." *Lemon*, 403 U.S. at 613. "If the state must engage in continuing administrative supervision of nonsecular activity, church and state are excessively intertwined." *Brandon v. Board of Ed. of Guilderland Central School Dist.*, 635 F.2d 971, 979 (2d Cir. 1980).

Entanglement is not an issue in this case. The DOE's efforts to assure compliance with the Establishment Clause in the operation of its schools via a uniform holiday display policy are designed to guard against the entanglement that would ensue if the DOE had to police each and every display in every public school year after year. *See Florey*, 619 F.2d at 1318, and *Clever v. Cherry Hill Township Bd. of Ed.*, 838 F. Supp. 929, 941 (D.N.J. 1993) (rejecting excessive entanglement challenge to school district policy designed to ensure compliance with Establishment Clause). If the DOE

were not permitted to design a policy that embraces the multiculturalism of the New York City public school children during the winter holiday season, school administrators might be left no choice but to exclude any reference to Christmas, Chanukah, and Ramadan. The Establishment Clause jurisprudence does not demand such a result. Because the DOE holiday display policy has a genuine secular purpose, does not impermissibly promote or inhibit religion, and does not unduly entangle the government in nonsecular activity, the policy on its face does not violate the Establishment Clause.

As Applied Challenge to DOE Policy

I turn next to the constitutionality of the winter holiday displays as the DOE displays policy was applied in P.S. 169, P.S. 165, and P.S. 184 in December 2001 and 2002. The constitutionality of these displays is governed by *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), in which the court of appeals recognized the endorsement test for as applied Establishment Clause challenges.[13] The endorsement inquiry is a "highly fact-specific test" that requires a court to ascertain whether "a reasonable observer of the display in its particular context [would] perceive a message of governmental endorsement or sponsorship or religion." *Elewski*, 123 F.3d at 53; *see Allegheny*, 492 U.S. at 593; *see*

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[13] In *Elewski*, the court of appeals found that a city-owned creche in a public park at the foot of a decorated evergreen tree and surrounded by sawhorse barricades with the mayor's name in red lettering, observed in the context of the entire downtown holiday display which included a privately owned menorah located in a nearby public park, was not a violation of the Establishment Clause because "an observer would perceive a celebration of the diversity of the holiday season, including traditional religious and secular symbols." *Elewski*, 124 F.3d 51, 55 (2d Cir. 1997).

also Capital Square, 515 U.S. 753. "Thus, if a [religious symbol's] context, like the context of the creche in *Lynch* or that of the menorah in *Allegheny*, neutralizes the message of governmental endorsement, then the [religious symbol] passes muster under the Establishment Clause." *Elewski,* 123 F.3d at 54. The context is important because "it is not the simple exposure to religious symbols that is constitutionally impermissible; rather, it is the message conveyed, particularly to impressionable youngsters, by linkage of such symbols to their public school." *Spacco v. Bridgewater School Dep't,* 722 F. Supp. 834, n.1 (D. Mass. 1989) (citing *Larkin v. Grendel's Den. Inc.,* 459 U.S. 116 (1982), and *Allegheny,* 492 U.S. 573)). "The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." *Quinones,* 803 F.2d at 1240 (quoting *Grand Rapids,* 473 U.S. 373).

Although the Establishment Clause jurisprudence is mindful of protecting impressionable children from the perception of government-sponsored religion in public schools, *see Edwards,* 482 U.S. at 583-84, "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer [who] must be deemed aware of the history and context of the community and forum in which the religious display appears." *Creatore v. Town of Trumbull,* 68 F.3d 59, 61 (2d Cir. 1995) (quoting *Capitol Square,* 515 U.S. at 773-74 (O'Connor, J., concurring in part and concurring in judgment)). This is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Elewski,* 123 F.3d at 53-4 (quoting *Lynch,* 465 U.S. at 694 (opinion of O'Connor, J.)). Accordingly, "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the

discomfort of viewing symbols of a faith to which they do not subscribe." *Capitol Square Review & Advisory Bd.*, 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in judgment).

Accordingly, the message presented by the display of a menorah and a star and crescent in the context of the greater holiday displays in the public schools must be reviewed as perceived by the children, Christian children in particular, but not one hyper-sensitive Catholic child. Upon reviewing the dizzying array of holiday symbols depicted in P.S. 165, 169, and 184, it is impossible to conclude that Christian students attending one of these schools may interpret the inclusion of menorahs and a star and crescent in the temporary displays as an endorsement of Judaism or Islam over Christianity or feel coerced into practicing a particular religion. The context of these holiday displays neutralizes the religious dimensions of the menorah and the star and crescent such that even a child participating in the creation of the display would not perceive it to be an endorsement of Judaism or Islam. Nor would any child looking at them objectively view these holiday displays, including, as they do, numerous Christmas symbols, and perceive a message of disapproval of Christianity. Ultimately, the effect of the holiday displays at P.S. 165, P.S. 169, and P.S. 184, is to allow students to share the knowledge of various religious and non-religious holidays occurring during the winter without feeling threatened by them. As in *Elewski*, a reasonable Christian child observing the display would not perceive religious endorsement or coercion but "a celebration of the diversity of the holiday season, including traditional religious and secular symbols of that season." *Elewski*, 123 F.3d at 55. The photographs of the displays in P.S. 184 and P.S. 169 in December 2002 reinforce the conclusion that the interpretation and implementation of the DOE holiday display policy is a model of neutralism and plurality.

Plaintiffs also allege that Nicholas and Christos were "directed" to make menorahs and thereby "directed to engage in a sort of mock religious practice of Jews." (Pls. Brief at 27-28.) However, as noted earlier, the evidence does not support a finding that the Tine children were "directed" to make menorahs. But, even if they were in some sense directed to draw and color menorahs as part of a lesson plan, for example, plaintiffs' assertion that this activity is "a sort of mock religious practice of Jews" borders on the offensive, displaying the very insensitivity for the religious practices of others that the DOE's policies are designed to reduce. Although classroom activities including the coloring of a picture of a menorah and learning from the teacher the religious origins of the symbol may be distasteful to the parent of a Christian child or to the child itself, such activities do not constitute a violation of the Establishment Clause. *See Santa Fe,* 530 U.S. at 313 ("By no means do [the Religion Clauses of the First Amendment] impose a prohibition on all religious activity in our public schools.") (internal citations omitted). Study of religion in the public schools, "when presented objectively as part of a secular program of education," does not offend the Establishment Clause. *Lynch,* 465 U.S. at 679-80 (citing *Abington School Dist. v. Schempp,* 374 U.S. 203, 225 (1963)). Courts have long held that teaching about religion may be part of a secular program of education, so long as instruction is "presented objectively" as part of an appropriate study of secular subjects such as literature, history, civilization, ethics, or comparative religion. *Altman v. Bedford Cent. School Dist.,* 245 F.3d 49, 76 (2d Cir. 2001) (quoting *Epperson v. Arkansas,* 393 U.S. 97, 106 (1968)); *see also Stone v. Graham,* 449 U.S. 39, 42 (1980). Moreover, "when the primary purpose served by a given school activity is secular, that activity is not made unconstitutional by the inclusion of some religious content." *Florey,* 619 F.2d at 1316. Clearly the creation of these displays fulfills the secular

objectives of the holiday display policy, which is to foster understanding and respect for the many beliefs, values, and customs stemming from the community's religious, racial, ethnic, and cultural heritage and do not violate the Establishment Clause.

FREE EXERCISE CLAIM

The Free Exercise Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship." *Altman*, 245 F.3d at 79 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)). To establish a violation of their free exercise rights, plaintiffs "must show the coercive effect" of the DOE's policy "as it operates against [them] in the practice of [their] religion." *Brandon v. Board of Educ.*, 635 F.2d 971, 976 (1980) (quoting *Abington*, 374 U.S. at 223). In addition, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

Plaintiffs' free exercise claims are based on their allegations that, by virtue of exposure to their schools' holiday displays and discussions regarding the origins of Chanukah or Ramadan during the creation of such displays, the children were subjected to coercion to accept the Jewish and Islamic faiths and to renounce Christianity. It is clearly established from both the content of the Holiday Displays memorandum and the multiple declarations of school teachers and administrators submitted by the City that the defendants do not intend to restrict the religious activities of any of the children in the schools, including the Tine children. However, if neutral actions have a restrictive effect, a court must inquire as to whether or not the "government has placed a substantial burden on the observation of a central religious belief or

practice." *Altman,* 245 F.3d at 79 (citation omitted). The evidence does not indicate that the DOE holiday display policy on its face or as applied in the temporary holiday displays in P.S. 165, 169, or 184 has the effect of operating against or burdening the Tine children's observation of their religious practices or beliefs. As noted earlier, the holiday displays evidenced in this action conveyed an inclusive message, did not advance or promote any particular religion, and did not coerce plaintiffs to reject Christianity. Thus, plaintiffs' passive exposure to and even their participation in the creation of the displays, including symbols from several different religious and cultural holidays, do not interfere with their ability to practice their own faith. Similarly, lessons given during the course of the holiday season about the meanings of the symbols or the origins of the holidays they represent, when presented in the secular manner evidenced here, do not interfere with the Tine children's ability to practice their own faith. Accordingly, the DOE holiday display policy on its face and as applied in P.S. 165, 169, and 184 does not violate plaintiffs' free exercise rights.

PARENTAL RIGHTS CLAIM

Parents have a First Amendment right to direct the religious upbringing and education of their children, *see Wisconsin v. Yoder,* 406 U.S. 205, 213-14 (1972), as well as a distinct Fourteenth Amendment liberty interest in the upbringing of their children, see *Immediato v. Rye Neck School Dist.*, 73 F.3d 454, 461 (2d Cir. 1995). However, these rights must be weighed against the State's interest in regulating elementary and secondary education. *Yoder,* 406 U.S. at 213-14; *Immediato,* 73 F.3d at 461.

Plaintiff Skoros' parental rights claim is closely related to the her children's free exercise claim. Plaintiff Skoros alleges

that, by virtue of the DOE's coercion of her children to accept the Jewish and Islamic faiths and renounce Christianity, the DOE infringed upon her right (1) "to control the religious upbringing and training of her minor children"; (2) "to raise her children according to the religion, system of values, and moral norms she deems appropriate"; and (3) "to the care, custody, education of and association with her children," in violation of the First and Fourteenth Amendments. (Am. Compl ¶¶ 25, 28.)

As previously noted, the evidence does not support a finding that the Tine children were in any way coerced to have them adopt Judaism or Islam or to renounce Christianity by their participation in the creation of the temporary holiday displays. In addition, the evidence does not support a finding that the temporary holiday displays in the Tine children's schools interfered with plaintiff Skoros' relationship with her children or her ability to control their upbringing. Although plaintiff Skoros repeatedly claims that Nicholas and Christos were "directed" to make a menorah, the more credible explanation is that offered by their teachers who state that the children were provided coloring books containing an image of a menorah which they chose to color. Certainly, such a situation does not amount to an act "undeniably at odds with fundamental tenets of [one's] religious beliefs." *Yoder,* 406 U.S. at 218. Accordingly, the DOE holiday display policy and the temporary displays in the Tine children's schools do not interfere in any way with plaintiff Skoros' raising her children.

CONCLUSION

For the aforementioned reasons, the clerk of court is directed to enter judgment in favor of the defendants on all counts and to furnish a filed copy of the within to all parties and to the magistrate judge.

SO ORDERED.

Dated: Brooklyn, New York
February 18, 2004

/s/
CHARLES P. SIFTON
United States District Judge

APPENDIX E

SEE FOLDOUT EXHIBIT

PICTURE OF THE NATIVITY

EXHIBIT

tabbies

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APPENDIX F

SEE FOLDOUT EXHIBIT

PHOTOGRAPH OF MENORAH DISPLAY

EXHIBIT

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(2)

No. 06-271

Supreme Court, U.S.
FILED
OCT 20 2006
OFFICE OF THE CLERK

In the

Supreme Court of the United States

ANDREA SKOROS, INDIVIDUALLY AND AS NEXT FRIEND OF NICHOLAS AND CHRISTOS TINE, ,
Petitioners,

v.

THE CITY OF NEW YORK et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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October 20, 2006

COUNTERSTATEMENT OF THE QUESTION PRESENTED

The Holiday Display Policy of respondent Department of Education permits the display in the New York City public school system of holiday symbols and decorations including Christmas trees, menorahs and the star and crescent, when presented in the company of one or more symbols of other religions, but does not permit depictions of deities, religious texts, or scenes of worship such as the Christian nativity scene ("crèche").

Does this policy violate the Establishment Clause?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, as amended March 27, 2006, is reported at 437 F.3d 1 (2d Cir. 2006); it is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 3a-121a..

The Petition for rehearing or rehearing en banc was denied by order filed May 25, 2006. The denial is reproduced in the Appendix to the Petition for Certiorari at pages App. 1a-2a .

The memorandum and order of the United States District Court for the Eastern District of New York, No. CV-02-6439, is dated February 18, 2004 and is unpublished. It is available at 2004 U.S. Dist. LEXIS 2234 and is also reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 124a to App. 156a.

STATEMENT OF THE CASE

Petitioner Andrea Skoros, on behalf of herself and her children (hereinafter collectively "petitioners") alleges that respondents have "coerced" her children to accept Judaism and Islam while conveying a message disapproving of Christianity because the respondents' holiday display policy does not permit the display of nativity scenes (crèches) in the public schools, while permitting the display of Christmas trees, menorahs, and the star and crescent. Petitioner further claims that her children have been "exposed to the Jewish Menorah and the Islamic Star and Crescent," and that her son Nicholas Tine was taught about the origin of Hanukah but not about the origin of Christmas. Petitioners challenge respondents' guidelines concerning holiday displays ("Holiday displays policy"), and respondents' alleged practice under the guidelines. They brought suit under 42 USC § 1983, and, as limited by the instant petition for certiorari, allege a violation of the Establishment Clause of the First Amendment to the United States Constitution.

Respondents assert that New York City Department of Education ("DOE") guidelines concerning holiday displays do not promote any religion, and indeed clearly prohibit the endorsement of religion. In relevant part, the guidelines as disseminated in a memorandum from the General Counsel to the Chancellor dated November 28, 2001 stated:

> The following guidelines should be followed with respect to the display of cultural/holiday symbols.

1. The display of secular holiday symbol decorations is permitted. Such symbols include, but are not limited to, Christmas trees, Menorahs, and the Star and Crescent.

2. Holiday displays shall not appear to promote or celebrate any single religion or holiday. Therefore, any symbol or decoration which may be used must be displayed simultaneously with other symbols or decorations reflecting different beliefs or customs.

3. All holiday displays should be temporary in nature.

4. The primary purpose of all displays shall be to promote the goal of fostering understanding and respect for the rights of all individuals regarding their beliefs, values and customs.

In response to a request from William A. Donohue, President of the Catholic League for Religious and Civil Rights "to put nativity scenes in public schools where menorahs and/or crescents and stars are already displayed," a correspondence ensued between the Chancellor's counsel and Donohue as to the interpretation of Supreme Court precedents on public displays of holiday symbols.[1]

The last letter from the Chancellor's counsel stated, in relevant part:

> Your reliance on Capitol Square Review Board v. Pinette is misplaced. That case involved the

[1] The correspondence is cited by the Court, App. 11a-12a.

display of a cross in a public square that had been designated as a public forum. It is well established that public schools are not public fora. In fact, case law instructs that the Establishment Clause issues must be very closely scrutinized in the special setting that schools present.

The fact that a crèche was permitted to be displayed in a private park along with other holiday symbols in Lynch v. Donnelly is inapt. Again, that case did not arise in a school setting and was expressly limited to its facts. Similarly, County of Allegheny v. ACLU does not require a different conclusion. It does not, as you claim, stand for the proposition that as long as a religious symbol is displayed with non-religious symbols, it will automatically be a constitutional display. The Allegheny court recognized that while the Menorah has both religious and secular dimensions, it has become the primary visual symbol for the holiday of Hanukkah. Further, the Court acknowledged that there is no more secular alternative symbol to represent Hanukkah. Neither of these factors holds true for the crèche. The crèche is solely a religious symbol, and there clearly are other secular alternative symbols of the Christmas holiday. There is nothing unlawful about a school district setting a policy of only permitting secular symbols of the holiday season.[2]

By permitting the display of multiple and diverse holiday symbols with secular dimensions, while restricting the display of purely religious symbols in public schools, DOE serves the secular, educational purpose of promoting

[2] The letter is cited and summarized by the Court, App. 11a-12a..

cultural understanding, while avoiding the promotion or endorsement of any particular religious faith. Display of the crèche, as a representation of the birth of a figure central to the Christian religion, and others worshipping Jesus Christ as the Son of God, is not permitted by DOE's guidelines. This restriction is not unique to the crèche; the guidelines do not permit purely religious holiday displays for other religions, such as religious displays for Rosh Hashanah or Yom Kippur, or images of deities or religious figures. Petitioners in effect seek a special status for their own religion.

Petitioner commenced this action on December 29, 2002. She filed an amended complaint on February 28, 2003. Respondents answered on April 23, 2003. Petitioner filed a motion for summary judgment or in the alternative for a preliminary injunction on October 20, 2003. Respondents moved for summary judgment on October 24, 2003. On December 4, 2003, the parties agreed to withdraw their motions for summary judgment and to present the matter to the district court for decision as a bench trial on the basis of the papers submitted and any additional material submitted by the parties.

The District Court (Charles P. Sifton, D.C.J.) issued a Memorandum Decision and Order on February 18, 2004, directing the Clerk of Court to enter judgment in favor of the respondents on all counts. The judgment issued on February 19, 2004. In its 36-page decision the District Court, applying the Supreme Court holdings of Lemon v. Kurzman, 403 US 602 (1971), Lynch v. Donnelly, 465 US 668 (1984) and County of Allegheny v. Greater Pittsburgh ACLU, 492 US 573 (1989) found that respondents' Holiday Displays policy had not violated any of

Petitioners' rights. Specifically, the District Court found that the Holiday Displays policy "by its terms, states a secular purpose." Appendix to Petition (App.) 138a. The Court also found that the circumstances surrounding the adoption of the policy, including consultation with lawyers, DOE's counsel, and the Corporation Counsel's office, indicate that the stated purpose is not a sham but that rather the policy was devised "with an eye towards parity and a concern that the holiday displays do not promote or celebrate any single religion or holiday" App. 139a. The District Court then found that "the advancement of a secular program of education, and not of religion, is the primary effect of the policy and its interpretation," App. 144a, and concluded that the policy avoided both "the entanglement that would ensue if the DOE had to police each and every display in every public school year after year" and the necessity to "exclude any reference to Christmas, Chanukah, and Ramadan," App. 149a, a result not demanded by the Establishment Clause.

The Court of Appeals for the Second Circuit affirmed by a two to one vote, holding that "the respondents do not violate the Constitution when, in pursuing the secular goal of promoting respect for diverse cultural traditions, they do not include a crèche in such displays, representing Christmas through a variety of that holiday's well recognized secular symbols, even though Chanukah is represented by the menorah and Ramadan by the star and crescent." App. 6a-7a.

Circuit Judge Straub concurred in the majority's affirmance of the District Court's rejection of Petitioner's Free Exercise and parental rights claims, which is not challenged on this petition. He dissented from the

majority's decision on the Establishment Clause claim, and stated that "My chief disagreement with the majority is as to the 'reasonable observer' in this case." App. 83a. The dissent argues that the appropriate focus of an "effects" inquiry should be on the "reasonable student observer" who may be an elementary school student, App. 95a, and a "reasonable parent observer" who is the parent of such a student (99a).

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between the Circuits. The Second Circuit's Decision Was Consistent With And Built Upon Other Case Law.

There is no conflict between circuits.

Petitioners attempt to create the illusion of a conflict by mischaracterizing the Second Circuit majority opinion. First among these misstatements is the allegation that the majority failed to view the effect of the policy "from the perspective of young and impressionable students" and "failed to properly consider the public school context of this case." Petition Points III and IV.

Petitioners repeat, like an incantation, the fact, disputed by no party and no circuit, that the public school context is different from, and more sensitive than, public displays in non-school contexts. However, an examination

of the majority opinion shows that the majority in no way ignored the special character of the public schools.[3]

The Petitioners also incorrectly allege that the majority's decision is "in conflict with decisions from this and other federal courts." Id.[4]

The majority, after first discussing the holiday display precedents of the Supreme Court and its own and other circuits, stated "[W]e now confront the constitutionality of holiday displays in a different and more

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[3] The three cases cited in footnote 7 on page 12 of the Petition for Certiorari in this respect stand only for the undisputed proposition that the focus of a court's analysis must be on the "effect on the elementary school students" who are the "intended audience" due to the "impressionability of young elementary-age children." In relevant respect, these decisions are indistinguishable from the majority's holding in the instant case, as explained post.

[4] Recent circuit decisions on this issue include O'Connor v. Washburn University, 416 F.3d 1216, 1228 (10th Cir. 2005) (effect prong of the endorsement test presumes a reasonable observer "aware of the history and context of the community and forum" in which the display appears); Rusk v. Crestview Local School District, 379 F.3d 418, 420-422 (6th Cir. 2004) (rejecting Petitioner's contention that court should assess school's practice from the perspective of a student); American Civil Liberties Union v. McCreary County, 354 F.3d 438, 461 (6th Cir. 2003), aff'd, 125 S.Ct. 2722, (2005) (reasonable observer "is charged with knowing the history of the respective displays"); Altman v. Bedford Central School District, 245 F.3d 49, 75 (2d Cir.), cert. denied sub nom. Dibari v. Bedford Central School District, 534 US 827 (2001) (the reasonable-observer test is an objective standard).

difficult context: public elementary and secondary schools." App. 30a.

Similarly, the majority emphasized the public school context in discussing the policy's stated purpose and finding it permissibly secular:

> In teaching the lesson of pluralism in New York City public schools, the defendants confront a greater challenge than the one at issue in Kiryas Joel,[5] simply by virtue of the enormous size of the City school system and the extraordinary cultural diversity of its student body. Moreover, because a significant number of New York City school children or their parents are immigrants, sometimes from countries that place little value on either diversity or tolerance, City schools play a particularly important role in teaching these essential elements of pluralism to future generations of Americans. The fact that they do so, particularly at lower school levels, through cheerful multicultural holiday displays rather than formal textbook assignments, does not diminish the importance of the lesson, much less call into question its secular purpose.

App. 37a.

The majority stated that "[W]e assume the objective observer is an adult who, in taking full account of the policy's text, history and implementation, does so mindful that the displays at issue will be viewed primarily by impressionable schoolchildren (emphasis added)." App. 44a-45a. The majority also discussed the "special concerns [that] arise in the identification of a reasonable observer" in

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[5] Board of Education of Kiryas Joel Village v. Grumet, 512 US 687 (1994).

a city's public elementary and secondary schools." App. 59a-62a. This language mirrors that in Edwards v. Aguillard, 482 US 573, 585-585 (1987).

The majority did not create a split among the circuits, as appellants alleged. The majority applied the "reasonable observer" analysis as laid out by this Court in Good News Club v. Milford Central School, 533 US 98, 119 (2001), and in Justice O'Connor's concurrence in Elk Grove Unified School District v. Newdow, 542 US 1, 34 (2004) (O'Connor, J., concurring), two recent decisions concerning religion in the public schools that are neither discussed nor cited in the Petition for Certiorari.

The majority also discussed McCreary County v. ACLU, 125 S.Ct. 2722, 2734 (2005) which reaffirmed that a reasonable objective observer must take full account of the "text, legislative history, and implementation of the statute." App. 44a.

The majority opinion stated, "We agree that the intended recipient of a display message is a factor -- undoubtedly an important factor -- to be considered by the reasonable objective observer whose perceptions determine whether the government acts with a purpose and effect that violates the Establishment Clause, but we do not think the intended recipient of a display necessarily defines the objective observer." App. 45a-46a.

The majority concluded that "when the issue is whether an immature mind would process the same information differently, some evidence on that point may well be necessary to permit a judge to conclude, as the

dissent does here, that displays that would communicate pluralism to an objective adult would communicate religious endorsement to a Jewish or Muslim child." App. 51a.

However, even if one deemed the youngest schoolchildren to be the relevant "objective observer" rather than, as the majority did, the intended audience, the petition fails to show that this would change any other part of the majority's analysis. The majority opinion enumerated the variety of holiday symbols that were displayed in the Tine children's classrooms during the relevant times. App. 12a-19a. Those symbols included not only the disputed menorah, star and crescent, and Christmas tree, but kinaras (a Kwanza symbol), a wall covering resembling a large gift box, an American flag, dreidels, App. 12a-13a, snowflakes, Christmas wreaths, stockings, snowmen, Santa Claus, App, 13a-14a, reindeer with shiny red noses, five-pointed stars, single candles, gingerbread boys and candy canes, App. 16a-17a. No symbol was displayed in isolation, but invariably surrounded by symbols of other religions or traditions. App. 48a-49a.

The majority thus properly concluded:

> Thus, when menorahs or stars and crescents are displayed, their religious significance is appropriately neutralized by myriad accompanying symbols of other winter holidays having nonreligious as well as religious origins. As a result, no objective observer of the displays in evidence would understand the respondents' purpose to be other than that stated in the Holiday Display Memo, that is, to promote schoolchildren's understanding and respect for the

> many cultural traditions celebrated in New York City during the winter holiday season. Certainly, no objective observer would understand the purpose of the displays to be the endorsement or promotion of Judaism or Islam or the denigration of Christianity, as alleged by the Petitioner."

App. 49a (footnote and citations omitted).

II. The Court of Appeals Majority Correctly Held that the Policy Represents a Reasonable Means for Respondents to Avoid Establishment Clause Violations in their Schools and Does Not Express a Denominational Preference or Hostility to the Christian Religion.

The majority correctly noted that Petitioners' attempt to compel inclusion of the crèche is not required by Establishment Clause jurisprudence. It remarked that the Christian holiday of Christmas is well represented in the City's holiday displays policy through "a variety of well recognized and beloved symbols, including the Christmas tree, Santa Claus, reindeer, candy canes, gingerbread boys and girls, tinsel garlands, strings of lights, not to mention Christmas wreaths, candles, stars and presents." App. 55a. Many of these symbols have their origin in religious doctrine and imagery. App. 55a, n24.

"In fact, the policy strives to minimize the use of religious symbols to avoid Establishment Clause concerns. To the extent that [the holiday display policy approves the use of the menorah and the star and crescent in holiday displays, that decision appears to have been reached only after respondents determined that Chanukah and Ramadan could not reasonably be represented without these symbols and that such symbols could be incorporated into secular holiday displays celebrating pluralism. * * * [N]othing in the record indicates that the policy is in any way 'directed' at having schoolchildren utilize certain religious symbols qua religious symbols." App. 35a, n15.

The majority also noted that the DOE relied on Supreme Court precedent in devising their policy. The

majority cited to an affidavit from the DOE's then General Counsel that explained that "to ensure compliance with the Establishment Clause, the DOE's holiday display policy seeks to avoid the use of any holiday symbols that depict deities." App. 54a.

In particular, the majority noted the Supreme Court's decision in County of Allegheny v. ACLU, 492 US 573 (1989) holding that "a menorah -- although a religious symbol -- can constitutionally be integrated into a public holiday display that has a secular rather than religious purpose and effect." As the majority noted, "This ruling has itself likely contributed to increased inclusion of menorahs in secular holiday displays over the last fifteen years. * * * Indeed, we can find proof of this trend in the lobby of our own Foley Square courthouse, which is decorated in December with a Christmas tree, numerous poinsettia plants, and a menorah." App. 42a-43a.

Quoting its prior opinion in Marchi v. Bd. Of Coop. Educ. Servs., 173 F.3d 469, 476 (2d Cir. 1999), the majority recognize that when "government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause. App. 53a-54a. The majority explicitly found that the DOE made a good faith effort to understand and comply with complex Supreme Court precedents. App. at 40a-43a.

Petitioners admit that they do not seek to exclude the menorah and star and crescent from the examples of

permitted holiday displays, but to mandate inclusion of nativity scenes or crèches. Petition at 8. Thus, they do not object to exposing primary school children to religious symbols, but rather seek to require the display of one of the holiest symbols of their own religion in the primary schools.

As the Christian nativity scene explicitly depicts the Christian deity (the baby Jesus) as the center of a scene of worship, it falls on the wrong side of the line the respondents determined upon to separate permitted from impermissible symbols. The majority correctly found that DOE was reasonable in reasoning that the menorah and star and crescent are only symbols, even if symbols evocative of faith and miracles, and that the nativity scene is more than a symbol; it is an explicit representation of a miracle and of a deity being worshipped.

For example, the majority stated, "A nativity scene undoubtedly qualifies as the depiction of a deity, with the infant Jesus usually being worshipped as God-made-man by adoring angels, shepherds and wise men. While a menorah is understood to commemorate a miracle performed by God, it does not itself depict a deity. Nor does the star and crescent ... [T]he crèche conveys its religious message more representationally and less symbolically than the menorah and the star and crescent. For this reason, the religious significance of a crèche may be more obvious to the average schoolchild than that of the menorah and the star and crescent. Thus, whether or not the respondents' exclusion of the crèche is constitutionally mandated, an objective observer would recognize that the distinction drawn by the Chancellor's counsel reflects a sincere 'effort to avoid transgressing Establishment Clause

limits' [citing to Marchi], and not a religious purpose to endorse Judaism or Islam." App. 53a-54a.

The majority properly concluded its opinion by summarizing the results of its application of the Lemon v. Kurzman test and stating:

> We do not here decide whether the City could, consistent with the Constitution, include a crèche in its school holiday displays. We conclude only that the defendants do not violate the Establishment Clause when, in pursuing the secular goal of promoting respect for the City's diverse cultural traditions, they represent Christmas through a variety of well recognized secular symbols at the same time that they represent Chanukah through the menorah and Ramadan through the star and crescent.

App. 82a.

The Court of Appeals thus properly concluded that the respondents' Holiday Display policy does not violate the Establishment Clause because it does not express a denominational preference or hostility towards Christianity.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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October 20, 2006

Supreme Court, U.S.
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No. 06-271

In the Supreme Court of the United States

ANDREA SKOROS, individually, and next friend of NICHOLAS TINE, a minor, and CHRISTOS TINE, a minor,

Petitioners,

v.

CITY OF NEW YORK, JOEL L. KLEIN, in his official capacity as Chancellor, New York City Department of Education, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Constitutional Provision

U.S. Const. amend. I . . . . . *passim*

STATEMENT IN REPLY

The United States Constitution does not require a complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any. Respondents ignore this clear constitutional command and offer a tortured justification for adopting a school district policy that expressly permits Jewish and Islamic religious symbols in year-end holiday celebrations, but bans the similar use of Christian religious symbols. Unfortunately, the majority opinion of the Second Circuit upholding this policy against Petitioners' constitutional challenge was made possible by the unintelligibility of this Court's Establishment Clause jurisprudence. The conflict between the majority and dissenting opinions in this case amply demonstrates that the reasonable observer standard of the endorsement test is incapable of consistent application, and is, therefore, no standard whatsoever. This Court should grant review of this case and abandon this unworkable test in favor of a view of the Establishment Clause that produces results consistent with our Nation's religious heritage—a view which underlies the First Amendment itself. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring) ("What a strange notion, that a Constitution which itself gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.").

ARGUMENT IN REPLY

I. Respondents' Policy Disfavors Christianity in Violation of the Establishment Clause.

The Establishment Clause prohibits "practices suggesting 'a denominational preference.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989) (stating that "strict scrutiny" applies in such cases) (citation omitted); *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), a case upholding the public display of a crèche, this Court stated the principle of law applicable here,

> It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause.

Id. at 673 (internal punctuation, quotations, and citations omitted)(emphasis added).

With regard to the crèche, this Court stated,

> The crèche in the display depicts the historical origins of this traditional event [i.e., Christmas] long recognized as a National Holiday. . . . To forbid the use of this one passive symbol—the crèche—at the

> very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings.

Id. at 680 & 686 (emphasis added).

Moreover, in *Van Orden v. Perry*, 125 S.Ct. 2854 (2005), a case in which a plurality of justices upheld the display of the Ten Commandments on the grounds of the Texas State Capitol, Justice Breyer, in his concurring opinion, stated,

> At the same time, to reach a contrary conclusion here [i.e., removal of the display], based primarily upon the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

Id. at 2871 (Breyer, J., concurring) (emphasis added).

Respondents' tortured justification for their discriminatory policy creates the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid. Respondents make the rather innocuous claim that "[t]here is nothing unlawful about a school district setting a policy of only permitting secular symbols of the holiday season." Opp. Br. at 4 (quoting a letter from the Chancellor's counsel). In fact,

the policy states, in relevant part, "The display of secular holiday symbol decorations is permitted." Opp. Br. at 3. Yet, it is undisputed that Respondents' policy permits the display of the menorah during the Jewish holiday of Chanukah and the Islamic star and crescent during the Muslim commemoration of Ramadan, but forbids any display of the nativity—a depiction of the historical origins of Christmas—during this Christian holiday.[1] Opp. Br. at 4-5. Thus, it can hardly be said that this policy only permits the display of secular symbols.

Respondents state further, "This restriction is not unique to the crèche; the guidelines do not permit purely religious holiday displays for other religions, such as religious displays for Rosh Hashanah or Yom Kippur, or images of deities or other religious figures." Opp. Br. at 5. Respondents' assertion is absurd. Is Ramadan any more or less a religious holiday than Rosh Hashanah or Yom Kippur? What images of Islamic or Jewish deities do Respondents have in mind? Is it possible to display any such image without creating great offense to either religion? Why is the menorah—a symbol of a miracle that is central to the Jewish faith—any more or less religious than a simple scene of the nativity, which is a historical event? *See* 119a (dissent) ("Christians likely might

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[1] Respondents make the wholly exaggerated and quite inaccurate claim that the policy prohibits the "[d]isplay of the crèche, as a representation of the birth of a figure central to the Christian religion, and others worshipping Jesus Christ as the Son of God." Opp. Br. at 5 (emphasis added). In actuality, it is undisputed that Respondents' policy forbids the display of a simple picture of the nativity. *See* App. 157a (picture of the nativity). And it even prohibits students from drawing or coloring pictures of the nativity during classroom instruction, even though students receive books with the menorah for that purpose. *See* App. 15a.

take offense to the statement that a crèche is 'purely religious,' a contention that implicitly rejects the historical nature of the symbol."). How is an official rejection of the historical origins of Christmas serving "the secular, educational purpose of promoting cultural understanding"? Opp. Br. at 4-5. Indeed, when the Establishment Clause is invoked as a justification for a religiously divisive policy such as the one at issue here there is something fundamentally wrong with a jurisprudence that could produce such an inconsistent and bizarre result.[2] *See* Section II, *infra; see also County of Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us.").

In the final analysis, Respondent's policy is "unique to the crèche" and, therefore, the Christian holiday of Christmas. It is plainly unreasonable to conclude that this policy does not "suggest a denominational preference" or exhibit disfavor or hostility toward the Christian religion. Such hostility is a violation of the Establishment Clause. *See Lynch*, 465 U.S. at 673.

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[2] Respondents argue that the policy represents a "reasonable means" for them "to avoid Establishment Clause violations in their schools," noting that they "relied on Supreme Court precedent in devising their policy." Opp. Br. at 13-16; *see also* Opp. Br. at 14 ("The majority explicitly found that [Respondents] made a good faith effort to understand and comply with complex Supreme Court precedents."). The challenged policy itself makes the following disclaimer: "[W]e must be mindful that the Constitution prohibits a school system from endorsing or promoting a particular religion or belief system." App. 9a.

II. The Endorsement Test Is Incapable of Consistent Application and Should Be Abandoned.

Even if three judges sitting on a panel achieve agreement upon who the necessary hypothetical observer in the endorsement test is—an assumption that this case demonstrates is dubious[3]—it is unrealistic to expect different judges to reach consistent answers as to what any observer, the average observer, or the ultrareasonable observer would think. The conflict between the majority and dissenting opinions in this case demonstrates the veracity of this claim.

Indeed, the Second Circuit majority bemoaned the fact that "[t]he passage of time has produced no greater consensus on the Court in resolving First Amendment challenges to public displays of religious symbols," observing, "Government officials attempting to parse these sharply divided public display decisions might be forgiven for occasionally thinking, as do some of the justices, that they confront a 'jurisprudence of minutiae' that leaves them to rely on 'little more than intuition and a tape measure' to ensure the constitutionality of public holiday displays." App. 28a-29a (quoting *County of Allegheny*, 492 U.S. at 674-75 (Kennedy J., concurring in part and dissenting in part)); *see also ACLU v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) (Alito, J.) (observing that the Supreme Court's religious display decisions "have been marked by fine line-drawing," so that "it is not easy . . . to determine whether particular displays satisfy the Court's standards").

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[3] *See Van Orden*, 125 S.Ct. at 2867 (Thomas, J., concurring) ("The Court's foray into religious meaning either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose between those views.").

For example, Respondents claim that the majority did not err by selecting as the reasonable observer a disinterested adult rather than elementary school students (i.e., young and impressionable children) who are subjected to the inherently coercive atmosphere found in public elementary and secondary schools and their parents. Opp. Br. at 10. In support of their contention, Respondents cite to *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) and Justice O'Connor's concurrence in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 34 (2004) (O'Connor, J., concurring). But neither case supports the Second Circuit's departure from cases that *should* be controlling under circumstances presented by this case—where the challenged school policy is supported by school teachers during school hours on school premises. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting that students are susceptible to pressure in the classroom, particularly given their reliance on teachers as role models, and stating that when the school is advancing religion, the impressionability of students is relevant to the Establishment Clause issue). In *Good News Club*, this Court distinguished the applicable cases regarding the effect of a school policy on the impressionability of the students because that case involved "individuals who are not school teachers . . . giving lessons after school to children permitted to attend only with parental consent." *Good News Club*, 533 U.S. at 117. Moreover, in *Elk Grove Unified Sch. Dist.*, this Court reversed the Ninth Circuit's decision because the father challenging the school district's policy requiring teacher-led recitation of the Pledge of Allegiance lacked prudential standing. *Elk Grove Unified Sch. Dist.*, 542 U.S. at 17-18. Therefore, Justice O'Connor's discussion of the reasonable person standard in this case is dicta. Nonetheless, the cases cited by Respondents simply serve to further demonstrate the inability of the endorsement test to reach consistent results. *See, e.g., id.* at 45, n.1 (Thomas, J., concurring) ("Our

jurisprudential confusion has led to results that can only be described as silly."); *see generally Edwards*, 482 U.S. at 639 (Scalia, J., dissenting) (criticizing the Court's "embarrassing Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.").

In the final analysis, as Justice Thomas noted in his concurring opinion in *Van Orden*, "The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections. . . . [A] more fundamental rethinking of our Establishment Clause jurisprudence remains in order." *Van Orden*, 125 S.Ct. at 2867-68 (Thomas, J., concurring). Petitioners respectfully submit that this case presents an opportunity for this Court to rethink its jurisprudence and to provide much needed guidance that is capable of consistent application to the courts below.

CONCLUSION

As this and many other cases have demonstrated, the Establishment Clause jurisprudence of this Court is in need of substantial revision. This Court should grant review of this case and abandon the endorsement test in favor of a workable standard that is consistent with our Nation's religious heritage and capable of consistent application.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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